No. 96-1579-CFY
Status: GRANTED

Title: James Brogan, Petitioner
v.
United States

Docketed:
April 7, 1997

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Holtzman,Stuart A.

Counsel for respondent: Solicitor General, Glassman,Loren I.

40 printed copies rec'd 021497-1 retained 40 corr'd copies rec'd 040497 NOTE: See mail label re dkt dt. Counsel's name corr as above

Entry	Date	Note	Proceedings and Orders
1	Feb 13 1997	G	Petition for writ of certiorari filed. (Response due May 7, 1997)
2	May 7 1997		Brief of respondent United States filed. VIDED.
3	May 20 1997		DISTRIBUTED. June 5, 1997 (Page 2)
4	Jun 9 1997		Petition GRANTED. SET FOR ARGUMENT December 2, 1997. **********
6	Jul 1 1997		Order extending time to file brief of petitioner on the merits until August 18, 1997.
7	Jul 7 1997	G	Motion of respondent Reinaldo Roman for leave to proceed further herein in forma pauperis filed.
8	Jul 23 1997		DISTRIBUTED. September 29, 1997 (Page 57)
9	Aug 7 1997		Order further extending time to file brief of petitioner on the merits until August 21, 1997.
10	Aug 21 1997		Joint appendix filed.
11	Aug 21 1997		Brief of petitioner James Brogan filed.
12	Aug 21 1997		Brief amicus curiae of National Association of Criminal Defense lawyers filed.
14	Sep 24 1997		Order extending time to file brief of respondent on the merits until September 26, 1997.
16	Sep 26 1997		Brief of respondent United States filed.
15	Oct 6 1997		Motion of respondent Reinaldo Roman for leave to proceed further herein in forma pauperis GRANTED.
17	Oct 30 1997	X	Reply brief of petitioner James Brogan filed.
18	Oct 31 1997		CIRCULATED.
19	Nov 18 1997		Record filed.
		*	Record proceedings U.S. District Court, Southern District of New York (1 box).
20	Nov 19 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Second Circuit (1 volume).
21	Dec 2 1997		ARGUED.

Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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25 pp

QUESTION PRESENTED

Should the "exculpatory no" doctrine, recognized by Courts of Appeals for seven circuits as a complete defense to a false statement charge under 18 U.S.C. § 1001, but rejected below by the Second Circuit, be embraced by this Court?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America, Appellee,
v.
Robert Wiener, James Wiener, Richard Murphy, Michael Galati, Luis Cueto, John Pinto, Serge Jean-Jacques, Antonio DeJesus, Robert Humes, Joseph La Rosa,
Defendants,
Domenic Paciello, Reinaldo Roman, James Brogan, Defendants-Appellants.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

James Brogan, *Petitioner*,

v.

United States of America, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James Brogan respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals, United States v. Wiener (App. 1, *infra*) is reported at 96 F.3d 35 (2d Cir. 1996).

JURISDICTION

The Court of Appeals entered its judgment on September 16, 1996 (App. 14-15, *infra*). A petition for rehearing and a suggestion for rehearing in banc were denied by the Court of Appeals on November 15, 1996 (App. 16-17, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 1001.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of

New York, Petitioner was convicted of making a false statement in violation of 18 U.S.C. § 1001, and sentenced to a term of imprisonment. He has not begun serving his sentence.

Petitioner was a union delegate. On October 4, 1993, federal agents made a surprise visit to Petitioner's home. One of the agents asked Petitioner if he had ever received any money or gifts from JRD, a real estate management company that employed members of Petitioner's union. In response to the question, Petitioner simply said "no."[1]

On appeal, the United States Court of Appeals for the Second Circuit, while recognizing that it was out of step with seven other circuits, rejected the "exculpatory no" doctrine and affirmed the judgment of conviction. United States v. Weiner, 96 F.3d 35 (2d Cir. 1996) (App. 1, *infra*). A petition for rehearing and suggestion for rehearing in banc were denied on November 15, 1996.

REASONS FOR GRANTING THE PETITION

I. There is a Clear Conflict Among the Circuit Courts of Appeals As To the Validity of the "Exculpatory No" Doctrine.

The "exculpatory no" doctrine holds that 18 U.S.C. § 1001 is not applicable to false statements that are simply exculpatory denials of criminal activity.

As the Second Circuit acknowledged, its rejection of the "exculpatory no" defense conflicts with the acceptance of the defense by the First, Fourth, Seventh, Eighth, Ninth

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[1]Petitioner was not advised of his rights before being questioned, and as the government conceded in its brief below, Petitioner was not advised, until after he had given the "no" response, that making a false statement to a federal agent was a crime.

and Eleventh Circuits. Weiner, 96 F.3d at 37 (App. 6, *infra*).

The validity of the doctrine is an open question in the Third, Sixth and D.C. Circuits. Id. (App. 6, *infra*).

Apart from the Second Circuit, the doctrine has been rejected only by the Fifth Circuit. Id. at 37-38 (App. 6, *infra*).

Moreover, among the circuits that have accepted the validity of the defense, the legal tests employed in its application vary. See Nedra D. Campbell & Anne Gallagher, Eleventh Survey of White Collar Crime, 33 Am. Crim. L. Rev. 679 (Spring 1996).

This Court has never ruled on the validity of the doctrine, and should grant certiorari to resolve the sharp conflict among the circuits.

II. The Question Presented Is Important Because the "Exculpatory No" Doctrine Constitutes a Complete Defense To a Violation of a Criminal Statute and Because of Its Constitutional Implications.

The "exculpatory no" defense is of exceptional importance because it is a complete defense to a serious criminal charge. The continued disparity among the circuits poses the danger that guilt and punishment will be arbitrarily determined as a function of geography rather than conduct.

Furthermore, there is manifested a cruel trilemma where a suspect's only alternate courses of action to an exculpatory no are self-accusation and silence. The decision to remain silent is one that the suspect may perceive as an admission of guilt and from which in fact the questioner may infer the suspect's guilt. See United States v. Goldfine, 538 F.2d 815, 822 n.2 (9th Cir. 1976); Giles A. Birch, False Statements to

Federal Agents: Induced Lies and the Exculpatory No, 57 U. Chi. L. Rev. 1273, 1276. A suspect who is interrogated in a non-custodial setting has no right to remain silent: the suspect's silence can be exploited to his or her detriment at trial. See Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982); see also Erica S. Pearl, United States v. Rodriguez-Rios: The Fifth Circuit Says "Adios!" to the "Exculpatory No" Doctrine, 69 Tul. L. Rev. 621, 631-632 (December 1994).

III. The Decision of the Court of Appeals is Erroneous.

The circuits that have embraced the "exculpatory no" doctrine have done so for good and compelling reasons. For example, the First Circuit has held that mere denials are not "statements" within the meaning of 18 U.S.C. § 1001 because they are not affirmative declarations. United States v. Chevoor, 526 F.2d 178, 183-184 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976).

It has also been concluded that section 1001 was not designed as an instrument for "prosecutorial overkill," and is not applicable to denials where a truthful answer would incriminate the declarant, provided that the response was made to inquiries initiated by federal agents, and did not pervert basic governmental functions. United States v. Cogdell, 844 F.2d 179, 182-183 (4th Cir. 1988); United States v. Medina De Perez, 799 F.2d 540, 542-545 (9th Cir. 1986).

Yet another judicial concern motivating the application of the "exculpatory no" doctrine has been that "[e]ven without the legislative history supporting [the "exculpatory no" doctrine], a criminal prosecution for denying guilt to a law

enforcement officer is offensively close to a prosecution for a statement protected by the constitutional privilege against self-incrimination." Cogdell, 844 F.2d at 183. See also Medina De Perez, 799 F.2d at 547; United States v. Palzer, 745 F.2d 1350, 1354 (11th Cir. 1984).

Seven circuits, for sound and persuasive reasons, have recognized the validity of the "exculpatory no" doctrine.[2] In rejecting the views of those circuits, the Second Circuit has erred, and its decision must, therefore, be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
February 13, 1997

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[2] Congress' support of the "exculpatory no" defense is evidenced by the fact that, despite its long-standing vitality in the circuit courts, there has been no legislative enactment to limit or nullify it. Moreover, Congress' favorable view of the rationale underlying the "exculpatory no" defense is reflected in its approval of section 3C1.1 of the United States Sentencing Guidelines, Application Note one of which specifically precludes punishment enhancement for a defendant who falsely denies his or her guilt.

APPENDIX A

96 F.3d 35
65 USLW 2255

UNITED STATES of America, Appellee,
v.
Robert WIENER, James Wiener, Richard Murphy, Michael Galati, Luis Cueto, John Pinto, Serge Jean-Jacques, Antonio DeJesus, Robert Humes, Joseph La Rosa,
Defendants,
Domenic Paciello, Reinaldo Roman, James Brogan, Defendants-Appellants.
Nos. 535, 725, & 1248, Dockets 95-1294(L), 95-1403, & 95-1597.
United States Court of Appeals,
Second Circuit.
Argued April 4, 1996.
Decided Sept. 16, 1996.

Union officers were convicted, following jury trial, of unlawfully receiving money from an employer and of making false statements to federal investigators by the United States District Court for the Southern District of New York, Charles L. Brieant, J. Defendants appealed convictions for making false statements. The Court of Appeals, Winter, Circuit Judge, held that: (1) exculpatory "no" responses to questions by federal agent were false statements required for convictions, and (2) testimony that union officers were informed that false statements were illegal and answered questions in circumstances suggesting deliberation established required intent.

Affirmed.

*35 Loren I. Glassman, White Plains, NY, for Appellant Reinaldo Roman.

Stuart Holtzman, Holtzman & Taikeff, New York City, for Appellant James Brogan.

Anthony J. Servino, Servino & Seymour, White Plains, NY, for Appellant Domenic

Paciello.

Cynthia Keeffe Dunne, Assistant United States Attorney, Southern District of New York, NY (Mary Jo White, United States *36 Attorney; Marian W. Payson, Assistant United States Attorney, of counsel), for Appellee.

Before: WINTER, JACOBS and CABRANES, Circuit Judges.

WINTER, Circuit Judge:

Demoniac Paciello, Reinaldo Roman, and James Brogan appeal from convictions and sentences after a jury trial before Judge Brieant in the United States District Court for the Southern District of New York. All three were convicted of unlawfully receiving money from an employer in violation of 29 U.S.C. s 186(b)(1), (a)(2), (d)(2), and Roman and Brogan were also convicted of making a false statement to federal investigators in violation of 18 U.S.C. s 1001. We have decided all but one issue raised by these appeals by a summary order filed this day. See United States v. Wiener, Nos. 95-1294(L), 95-1403, 95-1597 (2d Cir.* * * * * * * * *). We write separately to reject the so-called "exculpatory no" doctrine as a defense to a false statement charge under 18 U.S.C. s 1001.

BACKGROUND

We relate only the facts relevant to Reinaldo Roman's and James Brogan's claims that the false statements for which they were convicted fell within the "exculpatory no" doctrine.

Roman and Brogan were officers of Local 32E, Service Employees International Union, AFL-CIO ("Local"). On March 18, 1993, federal agents made an unannounced visit to Reinaldo Roman's home in the Bronx. The agents identified themselves as federal agents and notified Roman that he was the subject of a federal grand jury investigation of labor law

violations. They stated that they had a subpoena requiring his appearance before the grand jury. Roman agreed to answer the agents' questions and invited them into his home. The interview took place in Roman's dining room. The agents began by eliciting routine background data such as Roman's date of birth and social security number, and progressed to questions concerning his employment by the Local. Roman stated to the agents that he had been a member of the Local for 30 years and had been a union delegate for the past eleven years. He indicated that his duties included visiting non-union buildings and trying to get new employees to join the union.

In response to the agents' questions, Roman denied that he had ever received cash from JRD Management Corporation, an employer of Local members. He gave responses such as "nothing" or "none." According to the testimony of one of the interviewing agents, Roman acknowledged that he knew that lying to federal agents was a crime but declined to modify his answers to the agents' questions. At trial, Roman was convicted of making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. s 1001.

On October 4, 1993, federal agents visited Brogan's house. After advising Brogan that their visit concerned an inquiry into JRD Management Corporation and other individuals, they informed Brogan that they were seeking his cooperation in their investigation and that if he chose to cooperate, he would need an attorney to do so. Brogan then agreed to answer the agents' questions. In response to the agents' questioning, Brogan indicated that he had been a Local 32E member since 1951 and had been employed as a union delegate during the years 1987 and 1988. Brogan, too, was asked whether, as a union delegate, he had

received any cash or gifts from JRD. He responded "no." According to the testimony of one of the interviewing agents, the agents then informed Brogan that they had executed a search of JRD's headquarters and had seized records indicating that he had in fact received cash from JRD. They also informed him that lying to federal agents in the course of an investigation was a crime. Shortly thereafter, the interview came to an end without Brogan modifying his answers. At trial, Brogan was convicted of making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. s 1001.

DISCUSSION

On appeal, both Roman and Brogan claim that their false statements fall within the so- *37 called "exculpatory no" doctrine, a defense to a Section 1001 charge recognized in many circuits, and that their convictions under Section 1001 must therefore be reversed.

To convict a defendant of violating Section 1001, the government must prove that the defendant: (i) knowingly and willfully, (ii) made a statement, (iii) in relation to a matter within the jurisdiction of a department or agency of the United States, (iv) with knowledge that it was false or fictitious and fraudulent.[1] United States v. Silva, 715 F.2d 43, 49 (2d Cir.1983). The so-called exculpatory denial or "exculpatory no" doctrine is a judicially-crafted exception to the statute created by various courts of

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[1]Section 1001 reads in full: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

appeals. See Timothy I. Nicholson, Note, Just Say "No": An Analysis of the "Exculpatory No" Doctrine, 39 Wash. U.J. Urb. & Contemp. L. 225, 232-49 (1991). While the breadth of the doctrine varies from circuit to circuit, the doctrine embodies the view that Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal activity.

We have neither recognized nor rejected the "exculpatory no" doctrine. Although it has often been argued before us, we have always found it inapplicable to the facts of a given case. See, e.g., United States v. Ali, 68 F.3d 1468, 1474 (2d Cir.1995) (declining to apply "exculpatory no" where defendant "did more than simply utter a simple denial" but made "a knowing and affirmative misrepresentation"); United States v. Cervone, 907 F.2d 332, 343 (2d Cir.1990) (declining to apply "exculpatory no" doctrine where one defendant made denial "in the context of a wide-ranging and discursive interview with agents who had identified themselves" and other defendant made statement which was not truly exculpatory), cert. denied, 498 U.S. 1028, 111 S.Ct. 680, 112 L.Ed.2d 672 (1991); United States v. Capo, 791 F.2d 1054, 1069 (2d Cir.1986) (declining to apply doctrine where defendant's "response was not a refusal to respond or a simple 'no' but consisted of 'affirmative misrepresentations' "), rev'd in part on other grounds, 817 F.2d 947 (2d Cir.1987) (in banc); United States v. McCue, 301 F.2d 452, 455 (2d Cir.) (stating that because interviewee was "well aware of the nature and purpose of the examination," the "exculpatory no" doctrine would not apply and decision on doctrine's availability "can be left until it arises"), cert. denied, 370 U.S. 939, 82 S.Ct. 1586, 8 L.Ed.2d 808 (1962).

Our flirtation with the "exculpatory no"

doctrine is over. We agree with Roman and Brogan that their statements constitute true "exculpatory no's" as recognized in other circuits, and we therefore consider whether the doctrine is a defense to Section 1001 liability in this circuit. We hold that it is not.

We pause to describe the current state of the doctrine. The Supreme Court has never ruled on the validity of the "exculpatory no" exception. It has, however, been accepted by the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. See Moser v. United States, 18 F.3d 469, 473-74 (7th Cir.1994); United States v. Taylor, 907 F.2d 801, 805 (8th Cir.1990); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir.1988); United States v. Tabor, 788 F.2d 714, 717-19 (11th Cir.1986); United States v. Fitzgibbon, 619 F.2d 874, 880-81 (10th Cir.1980); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir.1978); United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir.1975), cert. denied, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976). In addition to our own, the Third, Sixth, and D.C. Circuits have neither adopted nor rejected the "exculpatory no" doctrine. See United States v. LeMaster, 54 F.3d 1224, 1229-30 (6th Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 701, 133 L.Ed.2d 657 (1996); United States v. Barr, 963 F.2d 641, 647 (3d Cir.), cert. denied, 506 U.S. 1033, 113 S.Ct. 811, 121 L.Ed.2d 684 (1992); United States v. White, 887 F.2d 267, 273 (D.C.Cir.1989). Oddly enough, the Fifth Circuit, the first to adopt the doctrine, Paternostro v. United *38 States, 311 F.2d 298 (5th Cir.1962), has been the only circuit to reject it, United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir.1994) (in banc).

We turn to the merits. In our view, the plain language of Section 1001 provides no support for the doctrine. Although some

courts have held that no "statement" is made "if the defendant merely answers an inquiry in the negative rather than by affirmatively supplying information," Ali, 68 F.3d at 1474 (citation and quotation marks omitted), we agree with the Fifth Circuit that "as a matter of common sense and plain meaning, the word 'no' is indeed a statement." Rodriguez-Rios, 14 F.3d at 1044;[2] see also LeMaster, 54 F.3d at 1230 (same). A denial most certainly intends to convey information, whether "affirmative" or not, and is regarded by no one conversant with the English language as non-assertive. In reality, therefore, the "exculpatory no" doctrine is a "judicial gloss" on Section 1001, Moser, 18 F.3d at 473, that creates a "narrow exception to section 1001's plain language." United States v. Moore, 27 F.3d 969, 979 (4th Cir.), cert. denied, --- U.S. ----, 115 S.Ct. 459, 130 L.Ed.2d 367 (1994).

Judge-made exceptions to the plain meaning of a statute are not lightly undertaken. As the Supreme Court reiterated in its most recent decision interpreting Section 1001, "[i]n the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, [a court's] obligation is to apply the statute as Congress wrote it." Hubbard v. United States, --- U.S. ----, ----, 115 S.Ct. 1754, 1759, 131 L.Ed.2d 779 (1995) (citation and internal quotation marks omitted); id. at ----, 115 S.Ct. at 1758 (acknowledging United

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[2]Although we recognize, as did Rodriguez-Rios, that some courts have interpreted Section 1001's statutory phrase "Statements or representations" and its inclusion of other aggressive or inducing actions as evincing a statutory intent to penalize aggressive or inducing statements only, 14 F.3d at 1044, we agree with the Fifth Circuit that the statute's disjunctive construction discredits such a reading of Section 1001's plain language. See id.

States v. Bramblett, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955) as "seriously flawed" for "giving insufficient weight to the plain language of s ... 1001"); see also Demarest v. Manspeaker, 498 U.S. 184, 190, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Section 1001's statutory language is clear enough for us to hold that an exculpatory utterance, whether "no" or something more elaborate, is a "statement" within the purview of the statute, and we do so hold.

We also find no support for the "exculpatory no" doctrine in the legislative history of Section 1001. See Tim A. Thomas, Annotation, What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 USCS s 1001, Against Knowingly and Willfully Making False Statement Which Is Material to Matter Within Jurisdiction of Department or Agency of United States, 102 A.L.R. Fed. 742, 748-49 (1991) (describing legislative history of 18 U.S.C. s 1001 as one of the two complementary concerns that have led courts to create the exception and to define its scope).

Section 1001 has its earliest origins in a Civil War-era statute that made it a crime to make a false claim or to make a false or fraudulent statement or entry in support of such a claim. See Act of March 2, 1863, ch. 67, 12 Stat. 696. Following amendments to the statute's penalty clauses and a recodification, Congress again modified the false-statement portion of the statute in 1918 to require a purpose to cheat and swindle or defraud the government. Act of Oct. 23, 1918, Pub.L. No. 65-228, s 35, 40 Stat. 1015-16. Congress's aim seems to have been to ensure liability for false statements made to defraud government corporations. See Hubbard v.

United States, --- U.S. ----, ----, 115 S.Ct. 1754, 1760, 131 L.Ed.2d 779 (1995). In 1934, however, the fraudulent purpose requirement was removed at the request of the Secretary of the Interior, who wished to use the statute to enforce Section 9(c) of the National Industrial Recovery Act of 1933, Pub.L. ch. 90, 48 Stat. 195, 200, against producers of "hot oil," oil produced in violation of production restrictions established pursuant to the NIRA. See United States v. Gilliland, 312 U.S. 86, *39 93-94, 61 S.Ct. 518, 522-23, 85 L.Ed. 598 (1941) (discussing the history of the 1934 amendment); id. at 95, 61 S.Ct. at 523 (noting that the Supreme Court's decision in Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), holding the "hot oil" provisions of the NIRA unconstitutional, did not affect the validity of the 1934 amendments). Because of the earlier purpose requirement, the statute could not be used to enforce the NIRA, because any pecuniary or property loss that accrued from the production and sale of hot oil affected only other producers of oil, not the government. See Gilliland, 312 U.S. at 94, 61 S.Ct. at 522-23. Following the 1934 amendment, which effectively divorced the false-statement requirement from that of a false claim, the relevant language read ... whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States ... shall be fined not more than $500 or imprisoned not more than ten years, or both.

Act of June 18, 1934, Pub.L. No. 73-394, s 35, 48 Stat. 996-97. With the exception of recodifications and certain minor changes unimportant for our purposes, the 1934 language is essentially that of the modern Section 1001. See Act of Apr. 4, 1938, Pub.L. No. 75-465, s 35, 52 Stat. 197; Act of June 25, 1948, Pub.L. No. 80-772, 62 Stat. 683.

As this brief description of the legislative history indicates, nothing in the textual evolution of the false-statements statute evinces a congressional intent to move to progressively narrower liability. Indeed, the long-term trend is one of expansion. Nevertheless, "[t]he history of s 1001 has led numerous courts to conclude that its broad language generally prohibiting false statements of any sort cannot be taken at face value." Thomas, Annotation, supra, at 748. We cannot agree with those courts, particularly in light of the recent admonition in Hubbard that "[c]ourts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress." --- U.S. at ----, 115 S.Ct. at 1761. To the extent that courts adopting the "exculpatory no" doctrine have sought to delve even deeper into the reasons behind the 1934 amendment, tailoring liability to only those statements that "pervert the legitimate functions of Government," Paternostro, 311 F.2d at 305, their constructions amount to little more than a preference for a narrower over broader statute. That choice, however, is solely within Congress's province.[3]

Some courts have adopted the "exculpatory no" doctrine because of a "concern for Fifth

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[3]In addition, as the Rodriguez-Rios court noted, Congress has considered but failed to pass at least two bills that would again narrow criminal liability under Section 1001. See 14 F.3d at 1048 n.19.

Amendment values implicated by the application of s 1001 to a mere false denial of criminal wrongdoing." Thomas, Annotation, supra, at 748-49; see, e.g., United States v. Medina DePerez, 799 F.2d 540, 547 (9th Cir.1986) (discussing "distaste for an application of the statute that is uncomfortably close to the Fifth Amendment") (citation omitted); Tabor, 788 F.2d at 718-19 (discussing Fifth Amendment concerns). However, the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent. See Rodriguez-Rios, 14 F.3d at 1049-50; United States v. Steele, 933 F.2d 1313, 1320-21 (6th Cir.) (in banc) (individual has constitutional privilege against self-incrimination but no constitutional right to give untruthful statement), cert. denied, 502 U.S. 909, 112 S.Ct. 303, 116 L.Ed.2d 246 (1991); White, 887 F.2d at 274 (same). The Fifth Amendment's privilege against self-incrimination, therefore, lends no weight whatever to the "exculpatory no" doctrine.

Although we respectfully note the large number of Courts of Appeals that have adopted the "exculpatory no" doctrine, we find no support for it in statutory language *40 or legislative history. Indeed, it appears to have been fashioned from whole cloth with the result that even among circuits that have adopted it, there is a considerable divergence concerning its content. Compare United States v. Becker, 855 F.2d 644, 646 (9th Cir.1988) (setting out 5-step test which must be satisfied before applying the "exculpatory no" limitation: (i) false statement must not involve a claim against the government; (ii) must be responsive to inquiries initiated by federal agency; (iii) statement must not impair a governmental function; (iv) government inquiry must not have constituted a routine exercise of administrative, as opposed to investigative, responsibility; and

(v) a truthful answer would have incriminated the defendant), with United States v. Steele, 933 F.2d 1313, 1321 (6th Cir.) (in banc) (rejecting Ninth Circuit test as too broad), cert. denied, 502 U.S. 909, 112 S.Ct. 303, 116 L.Ed.2d 246 (1991). Even among those Courts of Appeals adopting the Ninth Circuit test, there is a divergence as to how liberally or narrowly the elements of the test should be applied. See generally John E. Davis & Michael K. Forde, Tenth Survey of White Collar Crime: False Statements, 32 Am.Crim. L.Rev. 323, 331 n. 38 (1995) (discussing differences between Fourth Circuit's and Ninth Circuit's application of five-part test). There is also a divergence of authority between those circuits that permit an affirmative exculpatory story or statement to qualify as an "exculpatory no," see e.g., United States v. Myers, 878 F.2d 1142, 1144 (9th Cir.1989) (applying doctrine to affirmative statements to secret service agents), and those that do not, see, e.g., United States v. Moore, 27 F.3d 969, 979 (4th Cir.) ("exculpatory no" doctrine does not extend to misleading exculpatory stories or affirmative statements other than simple denials), cert. denied, --- U.S. ----, 115 S.Ct. 459, 130 L.Ed.2d 367 (1994); United States v. King, 613 F.2d 670, 674 (7th Cir.1980) ("exculpatory no" applies only where the responses to government inquiry are merely "no" without affirmative discursive falsehood, under circumstances indicating that defendant is both unaware that he is under investigation, and is not making a claim or seeking employment). See generally Davis & Forde, supra, at 331 n. 42 (discussing other conflicts of circuit authority); Thomas, Annotation, supra, at 751-96 (same).

We add two cautionary points. First, the statute embodies a willfulness requirement. Arguably, to violate Section 1001, a person must know that it is unlawful to make such a

false statement. The Supreme Court recently held that the word "willfully" in 31 U.S.C. s 5322(a) requires that a defendant "act [ ] with knowledge that his conduct was unlawful." Ratzlaf v. United States, 510 U.S. 135, 137, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994). But see Rodriguez-Rios, 14 F.3d at 1048 n. 21 (distinguishing the meaning of "willfulness" in the context of 31 U.S.C. s 5322(a) from the meaning of "willfulness" in the context of 18 U.S.C. s 1001); United States v. Daughtry, 48 F.3d 829 (4th Cir.), cert. granted and judgment vacated on other grounds, --- U.S. ----, 116 S.Ct. 510, 133 L.Ed.2d 419 (1995). We do not decide whether knowledge of unlawfulness is an element of this crime, but nothing we say is intended to suggest that the mere denial of criminal responsibility would be sufficient to prove such an element. See United States v. Grotke, 702 F.2d 49, 52 (2d Cir.1983) ("[A] negative response cannot serve as proof of the requisite knowledge and willfulness required to convict under 18 U.S.C. s 1001, absent affirmative steps taken by the government to make the reporting requirements of the law known") (quoting Fitzgibbon, 619 F.2d at 876). Second, we also do not exclude the possibility that a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent. However, in the present case, the agents testified that they informed Roman and Brogan that such false statements were illegal and that Roman and Brogan answered the questions in circumstances suggesting deliberation. There was thus sufficient evidence to convict.

We therefore affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of September, one thousand nine hundred and ninety-six.

PRESENT: HON. Ralph K. Winter
HON. Dennis G. Jacobs
HON. Jose A. Cabranes

Circuit Judges

Docket Nos: 95-1294, 95-1403, 95-1597

UNITED STATES OF AMERICA,

Appellee,

v

ROBERT WIENER; JAMES WIENER; RICHARD MURPHY; MICHAEL GALATI; LUIS CUETO; JOHN PINTO; SERGE JEAN-JACQUES; ANTONIO DEJESUS; ROBERT HUMES; JOSEPH LA ROSA,

Defendants,

DOMENIC PACIELLO; REINALDO ROMAN; JAMES BROGAN,

Defendants-Appellants.

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of November[, one] thousand nine hundred and ninety-six.

USA

v Dkt No: 95-1294

Wiener, et al

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, James Brogan and, by counsel for the defendant-appellant, Renaldo Roman,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petitions for rehearing are **DENIED**.

It is further noted that the suggestions for rehearing in banc has been transmitted to the judges for the court in regular active service

and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon, rehearing in banc is denied.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

(2)

Nos. 96-1579 and 96-7999

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

REINALDO ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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18 pp

QUESTION PRESENTED

Whether there is an exception to criminal liability under 18 U.S.C. 1001 for a false statement that consists of an "exculpatory no."

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1579

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-7999

REINALDO ROMAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13)[1] is reported at 96 F.3d 35.

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[1] Unless otherwise noted, references are to the appendix to the petition in No. 96-1579.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1996. Petitions for rehearing were denied on November 15, 1996. Pet. App. 16-17. The petition for a writ of certiorari in No. 96-1579 was filed on February 13, 1997, and docketed on April 7, 1997. The petition in No. 96-7999 was filed on February 25, 1997, and is therefore out of time under this Court's Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of unlawfully receiving money from an employer, in violation of 29 U.S.C. 186(a)(2), (b)(1), and (d)(2), and of making false statements to federal investigators, in violation of 18 U.S.C. 1001. Petitioners Brogan and Roman were sentenced to nine and six months' imprisonment, respectively, to be followed in each case by two years of supervised release. Each petitioner was also fined $4,000. 96-7999 Pet. App. A7. The court of appeals affirmed.

1. Petitioners were officers of a union local. Pet. App. 2. On various occasions they accepted cash payments from JRD Management Corporation (JRD), a real estate management concern that employed union members. See Gov't C.A. Br. 9-17; Pet. App. 3-4. In March 1993, federal agents visited petitioner Roman's home. Pet. App. 2. After identifying themselves, the agents informed petitioner that he was the subject of a federal investigation and that they had a subpoena requiring his appearance before a grand jury. Petitioner agreed to answer the agents' questions and invited them into his home. *Id.* at 2-3. After eliciting

a variety of background information, the agents asked petitioner how much cash JRD had given him at Christmas in various years, to which he replied "Nothing." The agents then inquired whether petitioner had received cash at other times during the year, to which he replied "None." *Id.* at 3; 96-7999 Pet. 5. Petitioner acknowledged that he knew that lying to federal agents was a crime, but he declined to retract or modify his answers to the agents' questions. Pet. App. 3; see Gov't C.A. Br. 18-19.

In October 1993, federal agents paid a similar visit to the home of petitioner Brogan. Pet. App. 3. After identifying themselves and informing petitioner that they were investigating JRD and various individuals, the agents informed petitioner that if he wished to cooperate with the investigation he should have an attorney contact the United States Attorney's Office. *Ibid.*; see Gov't C.A. Br. 19. Petitioner then agreed to answer the agents' questions. Among other things, the agents asked petitioner whether he had received any cash or gifts from JRD, to which he responded "No." The agents then told petitioner that they had seized JRD records indicating that he had received cash from the company, and they warned him that lying to federal agents in the course of an investigation was a crime. The interview ended shortly thereafter, and Brogan did not modify his answers. Pet. App. 3-4.

Petitioners were tried together, along with several co-defendants. The jury convicted each petitioner of accepting unlawful cash payments and of making false statements to government investigators.

2. The court of appeals affirmed. Pet. App. 1-13. The court disposed of most of petitioners' contentions in an unpublished opinion (96-7999 Pet. App. A7-A10),

and petitioners do not renew those contentions in this Court. The court issued a separate published opinion, however, rejecting petitioners' attempt to rely on the "exculpatory no" exception that some courts have recognized as a defense to criminal liability under 18 U.S.C. 1001.

At the time petitioners made their false statements, Section 1001 generally prohibited, among other things, the making of "any false, fictitious or fraudulent statement[] or representation[]" in "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001 (1988).[2] As the court of appeals explained (Pet. App. 5-6, 11-12), however, several courts have adopted various versions of an "exculpatory no" exception to liability under Section 1001, holding generally that the law does not reach "false statements that are essentially exculpatory denials of criminal activity" (*id.* at 5). The court of appeals in this case agreed with petitioners that their statements to federal investigators "constitute[d] true 'exculpatory no's' as recognized in other circuits," but it declined to recognize any version of the "exculpatory no" exception. *Id.* at 6.

The court found "no support" for such an exception in the language of Section 1001. Pet. App. 6-8. The court rejected the argument that a defendant who "merely answers an inquiry in the negative" (*id.* at 6-

[2] In 1996, in response to this Court's decision in *Hubbard* v. *United States*, 115 S. Ct. 1754 (1995), Congress amended Section 1001 to clarify its language and extend its scope. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459. The appendix to this brief sets forth (at 1a-2a) the text of Section 1001 both at the time that petitioners made their false statements and as amended in 1996. The 1996 changes do not affect the question presented in this case.

7) has not made a "statement" within the meaning of the provision, holding instead that "an exculpatory utterance, whether 'no' or something more elaborate, is a 'statement' within the purview of the statute" (*id.* at 8). Similarly, the court's review (*id.* at 8-10) of the history of Section 1001's enactment and amendment over the years disclosed no support for the conclusion reached by other courts that the law's "broad language generally prohibiting false statements of any sort cannot be taken at face value" (*id.* at 10). The court found no basis for believing that a plain-language interpretation of Section 1001 would infringe any right protected by the Fifth Amendment's privilege against compelled self-incrimination, because "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent." *Id.* at 11.

The court noted that Section 1001 "embodies a willfulness requirement." Pet. App. 12. Although the court did not decide whether the government must show that a defendant knew that the law prohibits false statements, it cautioned that its rejection of the "exculpatory no" doctrine was not "intended to suggest that the mere denial of criminal responsibility would be sufficient to prove such an element." *Id.* at 13. The court also did not "exclude the possibility that a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent." *Ibid.* In this case, however, the court noted that "the agents testified that they informed [petitioners] that such false statements were illegal and that [petitioners] answered the questions in circumstances suggesting delibera-

tion." *Ibid.* The court therefore affirmed petitioners' convictions. *Ibid.*

DISCUSSION

1. The court of appeals correctly refused to recognize the judicially crafted "exculpatory no" exception to 18 U.S.C. 1001. The plain language of that Section imposes criminal liability on anyone who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. 1001 (1988).[3] That language applies by its terms to petitioners' statements to government investigators.

Some courts have reasoned that a defendant's mere denial of guilt is not a "statement" within the meaning of Section 1001. See Pet. App. 6-7. The court of appeals correctly rejected that argument "as a matter of common sense and plain meaning." *Id.* at 7. Nor does anything in Section 1001's history suggest that Congress intended the provision to be applied more narrowly than a natural reading would allow. See *id.* at 8-10; *United States* v. *Rodriguez-Rios*, 14 F.3d

[3] See note 2, *supra*. As recently amended, Section 1001 applies generally to anyone who "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully * * * makes any materially false, fictitious, or fraudulent statement or representation." See False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. 1001). The amended provision includes exceptions for certain matters within the jurisdiction of the Judicial and Legislative Branches. There is no exception for any matter within the jurisdiction of the Executive Branch, such as the investigation during which petitioners were questioned.

1040, 1048 (5th Cir. 1994) (en banc) ("[E]ven if it were necessary to go beyond the statute's plain meaning, the 'exculpatory no' exception defies the legislative history of § 1001."). And the Fifth Amendment poses no obstacle to the enforcement of a provision that punishes only "knowing[] and willful[]" lies. Under these circumstances, as this Court said when it recently considered Section 1001, "[the courts'] obligation is to apply the statute as Congress wrote it." *Hubbard* v. *United States*, 115 S. Ct. 1754, 1759 (1995).

As petitioners point out (96-1579 Pet. 2-3; 96-7999 Pet. 6-8), however, and as the court below recognized (Pet. App. 4-6, 11-12), the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted one version or another of the "exculpatory no" exception. See Pet. App. 6 and cases there cited; *United States* v. *Moore*, 27 F.3d 969, 978 & n.6 (4th Cir.) (collecting cases), cert. denied, 513 U.S. 979 (1994). Although there is considerable variation in the way the exception is applied (see Pet. App. 11-12), petitioners' simple denials of incriminating conduct in response to questions posed by government investigators would probably satisfy the requirements for the exception in most courts that have adopted it. See, *e.g.*, *United States* v. *Becker*, 855 F.2d 644, 646 (9th Cir. 1988) (setting out five-part test); but see *United States* v. *King*, 613 F.2d 670, 674 (7th Cir. 1980) (exception does not apply if defendant was aware that he was under investigation). It is clear, however, that the Fifth Circuit would have joined the court below in rejecting petitioners' argument. *United States* v. *Rodriguez-Rios*, *supra*; see also *United States* v. *Solis*, 46 M. J. 31 (C.A.A.F. 1997) (declining to recognize any "exculpatory no" exception to 10 U.S.C. 907, the military analogue to 18 U.S.C. 1001).

These cases therefore squarely present the conflict among the courts of appeals over the existence of an "exculpatory no" defense.

That conflict in the circuits warrants resolution by this Court. It is true that the government's general policy on the prosecution of cases involving false statements to federal criminal investigators is that "it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government." United States Attorney's Manual § 9-42.160 (adopted Feb. 12, 1996) (set forth in full at App., *infra*, 3a-4a).[4] That policy, together with the narrow contours of the "exculpatory no" exception even in those courts that recognize it, limits the number of cases in which the issue arises; and, even

[4] The government has had a similar policy for many years. See Memorandum for the United States at 8, *Nunley* v. *United States*, No. 77-5069 (filed Nov. 1977). In *Nunley*, after noting that the Section 1001 prosecution in that case had not been authorized by the Department under the policy then in effect, and that "[i]n the implementation of that policy the Department has normally refused permission to prosecute where an individual's false statements to any agency investigating possible criminal offenses essentially constitute mere denials of guilt," we requested that the Court vacate the judgment of the court of appeals and remand the case with directions to dismiss the indictment. *Id.* at 7-8. The Court did so. *Nunley* v. *United States*, 434 U.S. 962 (1977). After the Fifth Circuit rejected the existence of the "exculpatory no" doctrine in 1994, the Department suspended its prior policy and reevaluated the issue. The current policy was adopted on February 12, 1996. The policy is a guideline for the use of the Department's prosecutors; it does not represent the Department's construction of Section 1001, nor does it create judicially enforceable rights. See, *e.g.*, *United States* v. *Piervinanzi*, 23 F.3d 670, 682-683 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994).

in those cases, the exception is invoked far more often than it is actually applied.

Nonetheless, as these and other recent cases demonstrate, the government does occasionally bring prosecutions that can be characterized as involving a defendant's "exculpatory no" to federal criminal investigators. In addition, because of the complicated and inconsistent rules that apply in circuits that have recognized the "exculpatory no" defense (see Pet. App. 11-12), and because some courts have declined to take a firm position on the issue (see, *e.g.*, *United States* v. *LeMaster*, 54 F.3d 1224, 1227-1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996)), the issue gives rise to disputes over whether a particular defendant's false denial of guilt is subject to prosecution under Section 1001. While the defense is rarely successful, the incorrect appellate decisions recognizing any version of the doctrine thus generate a considerable amount of unproductive litigation.[5]

Two courts of appeals—including the Fifth Circuit, which created the doctrine in the first place (see Pet. App. 6)—have now rejected the "exculpatory no" doctrine in its entirety, resulting in a conflict among the circuits. These cases squarely present the issue, which is certain to recur, and the matter warrants resolution by this Court.

2. The petition in No. 96-7999 was filed out of time under this Court's Rule 13.1. See page 2, *supra*;

[5] The "exculpatory no" doctrine is also similar in some respects to a rule recently adopted by the Federal Circuit for federal employee disciplinary cases, which we have challenged in our petition for a writ of certiorari in *King* v. *Erickson*, No. 96-1395 (filed Mar. 4, 1997). We have provided petitioners in these cases with copies of our petition in *King*.

96-7999 Pet. 2. While the time limit established by that rule is not jurisdictional, *Schact* v. *United States*, 398 U.S. 58, 63-64 (1970), petitioner's failure to meet it would ordinarily be an appropriate ground on which to deny further review. We do not urge that course in this instance, however, because the petition in No. 96-1579, which presents the same question and seeks review of the same judgment, appears to have been timely filed.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
NINA GOODMAN
Attorney

MAY 1997

APPENDIX

1. As in effect at the time of petitioners' false statements, 18 U.S.C. 1001 (1988) provided:

§ 1001. Statements or entries generally

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. As amended by the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 18 U.S.C. 1001 now provides:

§ 1001. Statements or entries generally

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any

materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

3. The United States Attorney's Manual, Title 9, Chapter 42, § 9-42.160 (adopted Feb. 12, 1996) states:

9-42.160 False Statements to Federal Criminal Investigators

By its plain terms, 18 U.S.C. § 1001 broadly reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * *." Although the statute does not provide for exceptions, a number of courts of appeal have held that it does not apply to cases involving simple false denials of guilt in response to government initiated inquiries. *See, e.g., United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990); *United States v. Eguihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980); *United States v. King*, 613 F.2d 670 (7th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). These courts have concluded, inter alia, that mere denials of guilt do not impair the basic functions of the agency to which the statement is made.

Other courts have rejected the "exculpatory no" exception to 18 U.S.C. § 1001. *See, e.g., United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc); *United States v. Steele*, 933 F.2d 1313 (6th Cir.) (en banc), *cert. denied*, 502 U.S. 909 (1991). In addition, a few courts have neither adopted nor rejected the "exculpatory no" doctrine. *See, e.g., United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); *United States v. Cervone*, 907 F.2d 332, 342 (2d Cir. 1990); *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989).

It is the Department's policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or INS agents during routine inquiries) are also prosecutable, as are untruthful "no's" where the defendant initiated contact with the government in order to obtain a benefit.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to federal investigators. However, the Fraud Section is available for consultation on any case that involves application of these principles.

Supreme Court, U.S.
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No. 96-1579

IN THE

Supreme Court of the United States

October Term, 1997

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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JOINT APPENDIX

Relevant Excerpts from the Trial Testimony of Agent Trezza

[525] BY MS. DUNNE:

Q Agent Trezza, directing your attention to October 4, 1993, what did you do in connection with the investigation on that date?

A Agent Vincent Bufalieri of the Labor Department and I went to the residence of Mr. Brogan at 4277 Kipler Avenue in the Bronx.

Q And what occurred in connection with your visit to the premises?

A We went to the door, Mrs. Brogan answered the door and we identified ourselves as federal agents. We told her that we wanted to speak with her husband. She asked us to come into the house. Mr. Brogan, Mrs. Brogan and their daughter was -- sat down at the dining room table. We sat down with them. We identified ourselves to Mr. Brogan and said we were here in connection with an ongoing investigation of JRD [526] Management Company and other individuals.

Q What happened next?

A We asked Mr. Brogan if he was willing to answer some questions. We also advised him we were there for his cooperation in this matter and we advised him that -- I advised him that if he wanted to cooperate in this matter once he got to the US Attorney's office, he would need an attorney to do so.

We advised Mr. Brogan that if he couldn't afford an

attorney, one could be appointed for him. And I also advised him if he was going to secure an attorney of his own choosing, he would be best doing that as opposed to getting one provided by the Union.

Q Did you ask him any questions?

A Yes. We asked him if he would talk to us and he said, fine, he'd answer some questions. He said he was a -- in response to our questions, he said he was a 32E member since 1951 and that he was a union delegate in 1987 and 1988.

We asked him if he, as a union delegate, if he ever received any money or gifts from JRD.

And he responded no.

At that point we advised Mr. Brogan that we had executed a search warrant on the premises of JRD and that we found records that indicated that, in fact, he did receive money from JRD. And we advised him that lying to a federal agent [527] in the conducting of an investigation is a crime.

Q Did he make any further statements?

A He responded after that that I ain't telling him --

MR. HOLTZMAN: Objection, your Honor.

THE COURT: Sustained.

MR. HOLTZMAN: Objection. May we approach the bench?

THE COURT: Strike it out. Members of the jury, disregard the answer.

* * *

[532] BY MS. DUNNE:

Q What happened next?

THE COURT: No, no, no. Simple questions so we

don't get anything like that again.

MS. DUNNE: Okay.

Q Did you ask any further questions or --

THE COURT: Nothing further. No. Nothing more than that.

A Agent Bufalieri served Mr. Brogan with a Grand Jury subpoena requesting photographs, fingerprints, handwriting and voice exemplars. Upon leaving I advised Mr. Brogan again if he was to seek counsel, he should consider securing his own attorney and his daughter, Mr. Brogan's daughter, said that either a friend of the family or --

Q Were there any further statements by Mr. Brogan?

MR. HOLTZMAN: Objection.

THE COURT: I'll sustain any objection to what the daughter said.

Q Were there any further statements by Mr. Brogan?

MR. HOLTZMAN: Objection, your Honor.

[533] THE COURT: Sustained.

MS. DUNNE: Okay. No further statements.

BY MS. DUNNE:

Q And was your interview then complete?

A Yes, it was.

MS. DUNNE: No further questions.

CROSS EXAMINATION

BY MR. HOLTZMAN:

Q Mr. Trezza, what time was it you arrived at Mr. Brogan's residence?

A Approximately 6:00.

Q And before you arrived at his residence, did you know whether or nor Mr. Brogan had a telephone, sir?

A I'm sorry, what was that?
Q I said: Before you went to his residence, did you know whether or not Mr. Brogan had a telephone?
A I'm not sure.
Q Did you know whether or not Mr. Bufalieri knew if Mr. Brogan had a telephone?
THE COURT: I don't think he can be examined as to Bufalieri's mind.
MR. HOLTZMAN: Perhaps Bufalieri told him he knew.
THE COURT: You can ask him that.
A Not that I'm aware of, no.
Q Would it be fair to say neither you or Bufalieri made [534] any effort to reach Mr. Brogan by telephone to tell him you were coming to his house, correct?
A That's correct.
Q You didn't write him any letter either telling him that you were expecting to arrive at his house, correct?
A That's correct.
Q So you arrived on his doorstep completely unannounced, is that fair?
A That's correct.
Q And you intended that he shouldn't know before your arrival that you would arrive; didn't you?
A Could you repeat that, please?
Q Yes. Before you arrived there, it was your intention to conceal to Mr. Brogan that you were going to arrive there, you did not make any attempt to communicate to him that you were coming, did you?
MS. DUNNE: Objection.
THE COURT: Reframe the question.
Q Did you make any effort prior to your arrival at Mr. Brogan's residence to let him know to expect you?

A That's not --
Q I asked you a question, sir, can you tell me yes or no?
THE COURT: Please don't yell. I'm the only one here that can do that and I try not to do it.
MR. HOLTZMAN: Fine, your Honor.
[535] Q The answer was no; is that correct?
A That's correct.
Q Would it be fair to say the reason you didn't do so was for the element of surprise, correct?
A Partly.
Q Now you testified --
THE COURT: Whatever he testified, we heard, don't give us that.
MR. HOLTZMAN: I'm sorry, your Honor.
Q Before your departure, you handed Mr. Brogan a subpoena requiring him to appear before the Grand Jury and provide handwriting exemplars, voice exemplars, a photograph of himself and fingerprints, correct?
A Yes.
Q And you know that he complied with that, correct?
A I don't personally know that, no.
Q Have you ever heard he didn't comply with it, sir?
A No.
MR. HOLTZMAN: Just give me another moment, sir. (Pause.)
MR. HOLTZMAN: I have no other questions, sir.
THE COURT: Anything else? Thank you very much, please step down.
(Witness excused.)

Supreme Court, U.S.
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(4)

No. 96-1579

IN THE

Supreme Court of the United States

October Term, 1997

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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39pp

QUESTION PRESENTED

Should the "exculpatory no" doctrine, which bars prosecution under 18 U.S.C. § 1001, of a person who, upon inquiry, falsely denies his or her guilt to a federal agent, be embraced by this Court?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America, Appellee;

Robert Wiener, James Wiener, Richard Murphy, Michael Galati, Luis Cueto, John Pinto, Serge Jean-Jacques, Antonio DeJesus, Robert Humes, Joseph La Rosa, Defendants, Domenic Paciello, Reinaldo Roman, James Brogan, Defendants-Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 96-1579

James Brogan, *Petitioner*,

v.

United States of America, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals, *United States v. Wiener*, is reported at 96 F.3d 35 (2d Cir. 1996).

JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on September 16, 1996. A petition for rehearing and a suggestion for rehearing en banc were denied by the Court of Appeals on November 15, 1996. The petition for a writ of certiorari was filed on February 25, 1997, and was granted on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 1001 (1988), that provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of New York, Petitioner Brogan was convicted of making a false statement in violation of 18 U.S.C. § 1001, and accepting a $150 gratuity on December 14 1988 in violation of the Taft-Hartley Act. The December 14, 1988 payment of $150 was also charged as the acceptance of a bribe, but Brogan was acquitted on that count. He was sentenced to nine months imprisonment, two years of supervised release, and fined $4000. Execution of the sentence was stayed, and Brogan is currently at liberty.

Brogan was a union delegate. On October 4, 1993, at 6:00 PM, federal agents made a planned surprise visit to Brogan's home (App. 1, 3-5). At the time of the visit, the agents were aware of evidence that Brogan and others had accepted bribes (App. 2). Their purpose in making the visit was to convince Brogan to "cooperate" in their investigation

(App. 1). One of the agents asked Brogan if he had ever received any money or gifts from JRD, a real estate management company that employed members of Brogan's union (App. 2). In response to the question, Brogan simply said "no" (App. 2).[1]

At trial, the government offered evidence of three alleged payments made to Brogan prior to December 14, 1988. These three payments were ruled inadmissible, on statute of limitations grounds, as evidence of his accepting bribes or gratuities. The payments were, however, admitted in support of the false statement count.

On appeal, the United States Court of Appeals for the Second Circuit, while recognizing that it was out of step with seven other circuits, rejected the "exculpatory no" doctrine and affirmed the judgment of conviction. *United States v. Weiner*, 96 F.3d 35 (2d Cir. 1996). A petition for rehearing and suggestion for rehearing en banc were denied on November 15, 1996.

SUMMARY OF ARGUMENT

This case presents for the Court's decision the validity of applying the exculpatory no doctrine, in its truest and simplest form, to a charge of making a false statement in violation of 18 U.S.C. § 1001. The issue presented by this case in no way relates to situations in which the accused's words or conduct in any way go beyond a simple "no"

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[1]Brogan was not advised of his rights before being questioned and, as the government conceded in its brief below, Petitioner was not advised until *after* he had given the "no" response that making a false statement to a federal agent was a crime (App. 2).

response when asked by federal agents if he has committed a crime. Based upon the facts of this case, a discursive response by the accused, or *any* elaboration of his answer beyond the utterance "no," is not an issue for decision on this appeal.

One evening, unannounced, so as to exploit the advantage of surprise, federal agents possessed of evidence that certain union officials, including Brogan, had accepted bribes, appeared at Brogan's home to question him. Their purpose was not to ascertain whether or not Brogan was guilty, but to enlist his "cooperation" in their investigation.

After some innocuous questions, and without first apprising Brogan of his constitutional right to remain silent, or that lying in response to inquiries posed by federal agents constituted a crime, they asked if he had ever accepted bribes. Brogan simply responded "no," and did not elaborate upon that response in any way.

Obviously, the posed question was not asked so the truth of the response could be evaluated. Had the answer been the undoubtedly hoped for "yes," longstanding accepted investigative techniques would have dictated that this was the propitious opportunity to enlist Brogan's "cooperation": the promise of leniency in exchange for Brogan inculpating and testifying against others. Significantly, at the time of the agents' visit, the statute of limitations had run on three of the four payments the agents had in mind.

For a period spanning some forty years, various federal district courts and eight federal circuit courts of appeals, for sound, compelling and correct reasons, uniformly and without exception, upheld the validity of the exculpatory no doctrine. The courts provided numerous well-reasoned, and valid justifications for the proposition that an exculpatory no response is not cognizable under 18 U.S.C. § 1001; while

the criteria, or tests, employed by the different courts had a certain degree of variation, Brogan's conduct, his verbal "no" response, and the context in which it occurred would have been found non-criminal, as a matter of law, by any of the courts that had decided the issue.

The courts validating the doctrine did so in part out of a recognition that an individual in Brogan's circumstances is placed in a legally unfair and unacceptable position. When asked the question about his participation in a crime, the suspect is faced with a harsh trilemma. His choices are self-incrimination, prosecution under section 1001, or remaining silent where silence will likely be perceived, by both suspect and agent, as a tacit admission of guilt, and moreover, can be exploited to the suspect's detriment at a subsequent trial. The statute punishes suspects such as Brogan for refusing to admit their guilt, and thus violates the spirit of the Fifth Amendment.

The cases have also recognized the validity of the doctrine because an unadorned, unelaborated upon "no" does not result in the perversion of a governmental function (the "hallmark" of a section 1001 violation), is not capable of facilitating or promoting such a result, and is thus not a statement within the meaning of the statute. Competent government agents, the courts have observed, are affected not a wit by a suspect's denial of guilt when that denial takes the form of a simple "no" answer to their inquiries about his commission of a crime.

Furthermore, 18 U.S.C. § 1001 is that rare example of a statute, a literal reading of which must be rejected, pursuant to well established principles of statutory construction, because such a reading can lead to a litany of absurd results. Most significantly, perhaps, is that a literal reading of the statute invites overkill and abuse by the overly

zealous prosecutor. This case presents an excellent example of the realization of that formidable danger. Here, the statute of limitations had run as to all alleged payments save one. The statute of limitations was circumvented, however, and in effect revived, by the government's literal, but perverted, use of section 1001.

Lastly, the legislative history of section 1001 clearly indicates that it was never the intent of Congress that a false "no" response was to be a valid basis for conviction under the statute.

POINT I

BECAUSE OF SOUND, THOUGHTFUL AND COMPELLING REASONS, MOST OF WHICH HAVE BEEN RECOGNIZED BY EIGHT CIRCUIT COURTS OF APPEALS, THE "EXCULPATORY NO" DOCTRINE SHOULD BE ACCEPTED BY THIS COURT.

A. Introduction

As in effect at the time of Petitioner's "no" response, and his subsequent prosecution, 18 U.S.C. § 1001 (1988) provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Brogan was charged with violating section 1001 based upon his false "no" response to federal agents who asked if he had accepted bribes while a union delegate. Such a "no" response, as numerous courts have recognized, is not cognizable under the statute, and Brogan's conviction must therefore be reversed.

Judicial recognition and acceptance of the exculpatory no doctrine began in 1953 with *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953). Over the ensuing forty years, the exculpatory no doctrine was accepted by numerous federal district courts and eight circuit courts of appeals.[2] Although there are variations in scope and differences in the legal tests employed by the circuits, undoubtedly all of the courts that have recognized the doctrine would have found that the

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[2]*See, e.g., Moser v. United States*, 18 F.3d 469, 473-74 (7th Cir.1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir.1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir.1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir.1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-81 (10th Cir.1980); *United States v. Rose*, 570 F.2d 1358, 1364 (9th Cir.1978); *United States v. Schnaiderman*, 568 F.2d 1208, 1212 (5th Cir. 1978), *overruled by United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1st Cir.1975), cert. denied, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976).

proscription of the statute did not include Brogan's conduct, the mere utterance of the word "no."

Over the more than forty-year history of the exculpatory no doctrine, courts and commentators have articulated compelling, sensible and correct reasons for concluding that section 1001 does not reach simple exculpatory denials of guilt. These reasons include: 1) a simple denial of guilt is not a statement within the purview of section 1001 because it does not constitute the perversion of governmental functions that the statute was intended to prevent; 2) the cornered suspect faces the legally unacceptable and cruel trilemma of self-incrimination, being charged with a section 1001 violation, or remaining silent where that silence is likely to be regarded by his inquisitor as a tacit admission of guilt and exploited to the accused's detriment at a subsequent trial; and 3) a literal reading of the statute can easily lead to absurd results, especially when wielded as a tool in the hands of an overzealous prosecutor to punish for an utterance, albeit false, having no real consequence upon the legitimate function of the government agency to which it was made.

Moreover, Congress has clearly evidenced its intention that the statute not be directed at conduct consisting of nothing more than a mere denial of guilt in response to a federal agent's question.

B. A simple denial of guilt is not a statement within the purview of 18 U.S.C § 1001 because it does not result in perversion of governmental functions, which is what the statute was intended to prevent.

Section 1001 "was designed 'to protect the authorized functions of governmental departments and agencies from the

perversion which might result from the deceptive practices [the statute] described.'" *United States v. Woodward* 469 U.S. 105, 109 (1985) (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)). Indeed, in reliance upon *Gilliland*, the perversion of governmental function has been characterized as "the hallmark of a § 1001 offense." *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc).

It is inconceivable that Brogan's "no" response, in the context in which it occurred, can rationally be said to have perverted, or was capable of perverting, a governmental function. Thus, Brogan's "no" was not a statement within the purview of section 1001. *See, e.g., United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972) (finding that statute's history reveals that it was not intended to embrace "oral, unsworn statements, unrelated to any claim of the declarant to a privilege from the United States or to a claim against the United States, given in response to inquiries initiated by a federal agency or department, except, perhaps, where such a statement will substantially impair the basic functions entrusted by law to that agency." (internal citations omitted)).

The surprise visit to Brogan's home by the agents was not calculated to ascertain whether or not Brogan had accepted bribes. The agents did not ask their question so they could evaluate the truthfulness of the response. The surprise visit, coupled with the question, was intended to intimidate Brogan and, thus, persuade him to "cooperate"--to communicate to him that leniency would accompany "cooperation" and that recalcitrance, an unwillingness to "cooperate," would bring the full wrath of the government upon him. While his "no" answer may have disappointed the agents, it did not "pervert the investigator's function in the manner the statute was intended to combat." *United States v. Moore*, 27 F.3rd 969,

978 (4th Cir. 1994) (quoting *United States v. Cogdell*, 844 F.2d 179, 184 (4th Cir. 1988)).

In *Cogdell*, the defendant, interviewed by an agent at her home, denied her fraudulent involvement in the cashing of a check. The court, upholding the exculpatory no doctrine, stated:

> Cogdell's statements also meet the requirement that they not pervert an agency's basic functions. A trained agent cannot be overly surprised when a suspected criminal fails to admit guilt. "We presume that a thorough agent would continue vigorous investigation of all leads until he personally is satisfied he has obtained the truth." [*United States v.*] *Medina De Perez*, 799 F.2d [540,] 546 [(9th Cir. 1986)]. A false denial of guilt does not pervert the investigator's basic function in the manner the statute was intended to combat, but is merely one of the ordinary obstacles confronted in a criminal investigation. *Id.* at 546; *see also United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc); *United States v. Bedore*, 455 F.2d [1109,] 1109-11 (9th Cir. 1972).

Cogdell, 844 F.2d at 184 (footnote omitted).[3]

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[3]The court distinguished Cogdell's statements from those in *United States v. Rodgers*, 466 U.S. 475 (1984), where the false report of a plot against the President's life "perverted the agencies' basic functions by 'turn[ing them] into . . . Missing Person's Bureau[s] for domestic squabbles.'" *Cogdell*, 844 F.2d at 184 n.6 (quoting *Rodgers*, 466 U.S. at 481). The *Cogdell* court observed that "[t]ypical of the kind of statements that are within the purview of section 1001 are false reports of crime made to federal law enforcement agencies that may engender groundless federal investigations." *Id.* (quoting *Bedore*, 455 F.2d at 1111). Similarly, for example, an answer that falsely alleges the guilt of another would also pervert basic agency functions by sending its investigators on a wild goose chase.

Brogan's "no" could not, and did not, pervert the authorized function of any governmental department or agency. Therefore, his simple denial was not a "statement" within the meaning of section 1001.

C. The cornered suspect faces the legally unacceptable and cruel trilemma of self-incrimination, being charged with a section 1001 felony, or remaining silent when his silence will likely be regarded as a tacit admission of guilt (as the suspect may well fear), and exploited to his detriment at a subsequent trial.

The suspect to whom federal agents pose the question of whether or not he has committed a crime has, *theoretically*, three choices: he can admit his guilt, thus incriminating himself, remain silent, or falsely deny his guilt. The key word is "theoretically." Context, the surrounding circumstances in which the suspect is confronted by his interrogators, converts the theoretical into reality, and it is within that reality--the real and oppressive confrontation the suspect faces, or reasonably believes he faces--that dictates or

determines what his real, rather than his theoretical, choices are.

The arrival of the agents at Brogan's door was not preceded by a polite call asking if they could come visit with him at a mutually convenient time to discuss their bribery investigation. Instead, their visit, previously unarranged, was calculated to take Brogan by surprise and to produce, with their knock in the night, shock, fright and anxiety. Brogan, inexperienced in confrontations with federal agents because of his prior lack of exposure to the criminal justice system, reacted just as the agents wanted and expected. They did not arrive with a surprise knock in order to create or foster a calm atmosphere. Their purpose was to instill panic so as to gain the upper hand. Surprise visits are the everyday work of federal investigators and these investigators knew it was not the everyday experience of Brogan to receive accusatory federal agents as uninvited guests in his home.

A suspect can remain silent in the face of inquiry by federal agents about his criminality. However, to argue silence was a viable choice for Brogan, and those similarly situated, is to ignore reality. Indeed, until the decision in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc), no court interpreting the false statement clause of section 1001 had found that silence was an available option to a suspect questioned by federal agents.

1. The option to remain silent is illusory because it is an unnatural and illogical response to an accusation of wrongdoing by federal agents, one from which the suspect will likely believe the agents will infer guilt, and, further,

because silence can be used to undermine and denigrate the accused's defense at a later trial.

From the viewpoint of a suspect being questioned by federal agents, the option to remain silent is tactically and logically unavailable. The inherent power imbalance between agent and suspect suggests to the latter that his withholding an answer will invite greater suspicion and perhaps even a more aggressive stance from the questioner. This is especially true where the suspect is not told, as Brogan was not, that remaining silent is an available option. Suspects may think they are under an obligation to answer questions propounded by a law enforcement official, and, thus, are unlikely to choose silence over an exculpatory response.

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the suspect's confrontation with the authorities occurred on a public road at a traffic stop, where the intrusion was far less unexpected and shocking than it was to Brogan, who was in the sanctity of his home when the knock at the door came. "[T]he aura of authority surrounding" a law enforcement officer, coupled with the suspect's knowledge that the officer has the discretion to take enforcement action, exerts "pressure on the detainee to respond to questions." *Id.* at 438.

In *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976) Judge Ferguson noted, in a similar vein, that:

> any appreciation of the communicative realities must lead to the recognition that standing mute in the face of questions is an exceedingly unnatural response and that "taking the fifth" has been so often accompanied by social ostracism that it is an unwholesome option.

Id. at 822 n.2 (Ferguson, J., dissenting).[4]

In *New Jersey v. Valentin*, 105 N.J. 14, 19, 519 A.2d 322, 324 (1987), the Supreme Court of New Jersey, interpreting a statute making it a crime for an individual "to hinder his own apprehension" when he "[v]olunteers false information to a law enforcement officer," observed that:

> Although the defendant was not constitutionally or statutorily compelled to answer the state trooper, an ordinary person stopped for a motor vehicle violation does not think he is "volunteering" answers to a law-enforcement officer's inquiries. Few persons under such circumstances think that they can refuse to answer. On the contrary, most believe that failure to respond will only lead to further involvement with the police officer. 3 W. LaFave, *Search & Seizure*, ¶ 9.2, at [3]52-55 (1978). *See generally United States v. Mendenhall*, 446 U.S. 544, 544-[47], 100 S.Ct. 1870, 1871-73, 64 L.Ed.2d 497, 509-11 (1980) (recognizing the substantial assertion of governmental authority involved when a law-enforcement officer stops an automobile and the likelihood that a citizen would feel constrained to respond to the officer's questions).

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[4]Indeed, the term "Fifth Amendment communist" became a part of the American lexicon precisely because of the wide-spread public belief that anyone invoking his or her Fifth Amendment right against self-incrimination is guilty.

Indeed, a suspect will not only feel that he must answer the propounded question, but that his failure to do so is likely to be treated by the agent as an admission of guilt. *See Moran v. Burbine*, 475 U.S. 412, 462 (1986) (Stevens, J., dissenting) (noting that many questioned suspects "may fear that silence or a request for counsel will be construed as an admission of guilt."). *See also* Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. Chi. L. Rev. 1273, 1276 (1990) (recognizing that "silence may be treated as an admission of culpability"); Erica S. Perl, *United States v. Rodriguez-Rios: The Fifth Circuit Says "Adios!" to the "Exculpatory No" Doctrine*, 69 Tul. L. Rev. 621, 631 n.69 (Dec. 1994) ("[A]s anyone who has been questioned by a police officer--*even in a non-custodial setting*--can confirm, remaining silent effectively is not an option." (emphasis added) (citing, generally, Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962)).

Moreover, silence is not a viable option because it can be used to denigrate and undermine the accused's defense at a subsequent trial. This Court has held that an accused's pre-arrest silence can be used for impeachment. *Jenkins v. Anderson*, 447 U.S. 231, 238, 240 (1980); *Raffel v. United States*, 271 U.S. 494 (1926). More significantly, perhaps, is that there exists ample judicial support for the proposition that the defendant's pre-arrest silence may be used against him at trial as substantive evidence of guilt. *See United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (collecting cases).

Thus, the accused may be forced to adopt a trial strategy not so much calculated to promote his success, but instead to avoid the likelihood that his silence will be used to denigrate his defense. The accused may be compelled to select

a strategy that is weak or marginal rather than vigorous and robust.

2. Because the suspect's option to remain silent is illusory, he is thus faced with the legally unacceptable dilemma of self-incrimination or violation of section 1001.

As Giles Birch has observed:

> A guilty suspect who is asked an incriminating question by a federal agent thus faces a harsh trilemma: he must confess his crime, lie and risk punishment under § 1001, or remain silent when silence may be treated as an admission of culpability. A statute that creates such a trilemma punishes suspects for refusing to admit their guilt.

Birch, *supra*, 57 U. Chi. L. Rev. at 1276 (footnote omitted).

A suspect's option to remain silent being illusory, section 1001 actually creates a legally unacceptable, and intolerable, dilemma: self-incrimination or prosecution under section 1001. This is the dilemma that exculpatory no jurisprudence has correctly focused upon in interpreting section 1001 as inapplicable to simple false denials of guilt. *See, e.g.*, *United States v. Payne*, 750 F.2d 844, 862 (11th Cir. 1985); *Lambert*, 501 F.2d at 946 n.4.

The question asked of Brogan by the federal agents who arrived unannounced at his home involved substantial and real hazards of self-incrimination. Their inquiry placed Brogan in the center of the conflict created by the intersection of 1001 and the Fifth Amendment. The central standard for application of the Fifth Amendment privilege is whether the

suspect is confronted by substantial and real, and not merely trifling or imaginary, hazards of self-incrimination. *See Marchetti v. United States*, 390 U.S. 39, 53 (1968).

Brogan was confronted in his home by federal agents seeking to elicit his "cooperation" regarding a criminal matter in which they believed Brogan to be involved. After some preliminary questions, the agents asked him about his acceptance of illegal bribes. By responding in the affirmative, Brogan would have, of course, incriminated himself. With the option of silence an illusory one, his only other viable avenue was to deny guilt and risk prosecution under section 1001. Without the judicial recognition of an exculpatory no exception, a suspect's Fifth Amendment privilege against self-incrimination--the essential mainstay of our adversarial system, *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966)--is rendered meaningless.

To rule otherwise would give the government a powerful tool to avoid its burden of proving a presumptively innocent person guilty. Coercion of a suspect rendered mute by a justifiable fear that his silence may be used against him, into admission of wrongdoing on pain of felony prosecution, violates the spirit of the Fifth Amendment. The government should not be allowed to coerce a person into admitting wrongdoing on pain of felony prosecution. *See Payne*, 750 F.2d at 862 ("It is primarily this solicitude for Fifth Amendment values that prevents us from attaching criminal liability to conduct consisting of mere exculpatory denials of wrongdoing.").

D. A literal reading of the statute can easily lead to absurd results, especially in the hands of an over-zealous prosecutor.

In *Sorrells v. United States*, 287 U.S. 435, 450 (1932), Chief Justice Hughes declared:

> To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.

More recently, this Court has observed:

> In the ordinary case, absent any "indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it."

Hubbard v. United States, 115 S.Ct. 1754, 1759 (1995) (citations omitted); *see also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (citing with approval *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1981) ("We have reserved some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute." (citations and internal quotation marks omitted) (ellipses in original)).

As the Eighth Circuit has recognized:

> [I]f we adopt a literal application of this statute, anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment. This is a formidable, indeed a dangerous, power the Government assumes the statute invests in law enforcement officials. We cannot blithely assume that Congress granted such a sweeping power.

Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967).

That absurd results can ensue upon a literal interpretation of the language of section 1001 is well illustrated by what happened in this case: Brogan was convicted and sentenced to incarceration because of a simple "no" response that was utterly meaningless and inconsequential to the government, its departments, its agencies, its agents, or indeed to anyone else, except, of course, Brogan.

The litany of absurd results a literal interpretation of section 1001 is capable of producing are limited only by the imagination of the United States Attorney. Under such circumstances, there can be no good reason to uphold a literal interpretation of section 1001 so as to permit the statute to be used to punish conduct consisting of nothing more than an exculpatory no.

The notion that citizens can be protected against the pernicious effects of overbroad criminal statutes by reliance on the restraint and discretion of prosecutors has been

emphatically rejected by this Court. *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964). Indeed, in prosecuting Brogan, the United States Attorney flagrantly violated its own clearly articulated policy, then in effect, which provided, "[w]here the statement takes the form of an 'exculpatory no,' 18 U.S.C. § 1001 does not apply regardless [of] who asks the question." United States Attorney's Manual § 9-42.160 (Oct. 1, 1988).

POINT II

THE EVIDENCE OF CONGRESS' RATIFICATION OF THE EXCULPATORY NO DOCTRINE IS CLEAR AND CONSISTENT: FOR FORTY YEARS CONGRESS TOOK NO ACTION TO ABROGATE THE DOCTRINE, DID NOTHING TO AFFECT THE DOCTRINE IN ITS 1996 REENACTMENT OF THE STATUTE, AND APPROVED THE COMMENTARY TO SECTION 3C1.1 OF THE SENTENCING GUIDELINES, WHICH EMBODIES THE DOCTRINE.

In *United States v. Wells*, 117 S.Ct. 921 (1997), this Court stated that "the significance of subsequent congressional action or inaction necessarily varies with the circumstances." *Id.* at 929. The circumstances surrounding Congress' inaction regarding the exculpatory no exception to 18 U.S.C. § 1001 compel the conclusion that Congress has ratified the doctrine.

The inaction, or so-called "silence," of Congress regarding the doctrine does not exist in a vacuum. Laurence

Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 516, 523-524 (1982). Rather, the legislative history regarding the exculpatory no exception to section 1001 must be considered as a whole. When so considered, it is clear that Congress has ratified this judicially crafted exception to the false statement statute.

A. Congress has acquiesced in the judicially crafted exculpatory no exception to 18 U.S.C. § 1001 by its longstanding inaction in response to the overwhelming acceptance of the doctrine by the federal district courts and circuit courts of appeals.

In construing 18 U.S.C. § 1014, this Court recognized that because judicial opinion was divided over the interpretation of that statute, "[i]t would thus be impossible to say which view Congress might have endorsed." *Wells*, 117 S.Ct. at 929. Regarding section 1001, judicial acceptance of the exculpatory no exception for a mere denial of guilt was consonant for more than forty years. Even as of today, the overwhelming majority of the circuit courts of appeals embrace the doctrine.

After its enactment in 1934, the first federal court to recognize an exception to section 1001 for a denial of guilt in response to questioning by federal agents was *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953). In 1962, the Fifth Circuit, in *Paternostro v. United States*, 311 F.2d 928 (5th Cir. 1962) (en banc), was the first appellate court to recognize and adopt the doctrine. Thereafter, seven other circuit courts of appeals also ruled that false negative responses to

questioning by federal officers were not within the purview of section 1001. *See* cases cited *supra* note 2.

For a span of more than forty years, until the Fifth Circuit's 1994 decision in *Rodriguez-Rios*, there existed overwhelming acceptance of the exculpatory no doctrine by all the district and circuit courts that ruled on it. This widespread and prevailing judicial landscape alone justifies the conclusion that Congress was well aware of the existence of the exculpatory no doctrine. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

This Court has presumed congressional acquiescence in a judicial interpretation of a federal statute when Congress has been aware of the interpretation by numerous federal courts and failed to amend the statute over an extended period of time. *E.g.*, *Evans v. United States*, 504 U.S. 255, 268-269 (1992) (stating that in light of a silent and aware legislature, "[o]ur conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way." (footnote and citations omitted)); *United States v. Ryan*, 284 U.S. 167, 175 (1931) ("[W]e should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years.") (citations omitted)); *see also Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-84 (1982); *Flood v. Kuhn*, 407 U.S. 258, 273-74 (1972).

B. When Congress reenacted section 1001 in 1996, it ratified the exculpatory no doctrine by declining to accept a proposed limitation upon it, while at the same time adopting other significant judicial interpretations of the statute set forth in the proposed Criminal Code Reform Act of 1981.

In 1981, as part of many proposed revisions to the criminal code, the Committee on the Judiciary proposed several changes to section 1001 to specifically clarify judicial interpretation of the statute. These included the scope of the statute's jurisdiction, whether materiality applied to all of its elements, and whether the exculpatory no defense was to be more narrowly construed. Congress did not adopt these amendments by the end of its session.

In fact, in 1981 Congress declined to limit the exculpatory no doctrine after consideration of the Judiciary Committee's proposed changes, which were based on many years of the combined efforts of members of both houses[5] of

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[5] *See* Senate Comm. on the Judiciary, Report on the Criminal Code Reform Act of 1981, S. Rep. No. 307, 97th Cong., 1st Sess. (1981). This bill to codify, revise, and reform title 18 of the United States Code was based on the "Committee's composite of the best features of the Report of the National Commission on Reform of Federal Criminal Laws (footnote omitted) [1971], prior bills in the Ninety-Third, Ninety-Fourth, Ninety-Fifth, and Ninety-Sixth Congresses, and comments, suggestions, and amendments received during hearings, conferences, and markups on this proposal." S. Rpt. 97-307 at 1 & n.1 (1981) (citation omitted). *See also* House Comm. on the Judiciary, Report on the Criminal Code Revision Act of 1980, H.R. Rep. No. 1396, 96th Cong., 2d Sess. 178-79, 182 (1980); *see generally*, Robert Drinan et al., *The Federal Criminal Code: the Houses are Divided*, 18 Am. Crim.L. Rev. 509 (1981); L. Schwartz,

Congress. The Committee urged Congress to adopt a very narrow construction of the exculpatory no doctrine, one that made the exception "available only when the false statement consists solely of a denial of involvement in a crime." S. Rep. No. 97-307, at 407 (1981). At the time Congress was urged to adopt this narrow exception, federal courts had accepted the exculpatory no doctrine for false statements by defendants that were made under circumstances significantly broader than a simple denial of guilt. *See, e.g., Bedore*, 455 F.2d at 1110 (giving a false name not within the class of false statements that section 1001 was designed to proscribe); *Levin*, 133 F. Supp. at 88-89 (defendant stated and represented to FBI that he did not have information as to the identity of owner of emerald ring).

Congress, cognizant of the broad interpretation of the exculpatory no doctrine, *Cannon*, 441 U.S. at 696-97, nevertheless chose against limiting the exculpatory no exception, and did not change the statute. In the ensuing years, three circuit courts of appeals joined the five that had already adopted the exculpatory no doctrine. *See United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir. 1986). Yet, Congress still declined to amend the statute. The circumstances of this congressional inaction unmistakably indicate Congress' acquiescence in the doctrine.

Moreover, when Congress undertook to reenact section 1001 in 1996, it amended the statute in accordance with the Judiciary Committee's 1981 proposals in response to

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Reform of the Federal Criminal Laws: Issues, Tactics and Prospects, 1977 Duke L.J. 171.

judicial interpretations of the statute's materiality requirement, *see* H.R. Rep. No. 104-680, at 3942 (July 16, 1996) ("Importantly, the offense in each of the three paragraphs has 'materiality' as an element. This express requirement . . . resolves a conflict among circuits as to whether materiality is an element of all three offenses . . . ."), and of its jurisdictional reach, *Id.* at 3941-42 (amending the statute to return "the scope of section 1001 to its pre-*Hubbard* status, by explicitly providing that section 1001 covers all three Federal branches."). Notably, this 1996 reenactment of the statute did not adopt the overly limited false denial exception proposed by the Judiciary Committee in 1981. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. § 1001).

This Court has repeatedly stated its reliance upon congressional reenactment of a statute without relevant change as indicating Congress' knowledge and approval of the prevailing interpretation by the judiciary. *See, e.g., Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." (citations omitted)); *see also* Tribe, *supra*, 57 Ind. L.J. at 529 ("Congress' silence respecting extant *decisional law* that had construed the very statutory language Congress has chosen to re-enact--a silence which, coupled with re-enactment, may be read to imply adoption of that law . . . ." (footnotes omitted) (emphasis in original)).

C. Congress has demonstrated its acceptance of the exculpatory no doctrine by twice approving an exception to the obstruction of justice sentencing enhancement provision for false denials of guilt.

Section 3C1.1 of the United States Sentencing Guidelines requires that a sentencing court add a two-level enhancement to a defendant's base offense level for obstruction of the administration of justice. However, Application Note 1 to the Commentary of that section states that "[a] defendant's denial of guilt . . . is not a basis for application of this provision." This commentary embodies the very essence of the exculpatory no doctrine. Although under no statutory obligation to submit commentary or amendments thereto to Congress, this language has on two occasions been submitted by the United States Sentencing Commission to Congress for its approval. On both occasions, Congress reviewed and approved the commentary, thus demonstrating its acceptance of the exculpatory no doctrine.

1. Although not required to do so, the United States Sentencing Commission has submitted to Congress for its review both the original and amended commentary to section 3C1.1.

The United States Sentencing Commission (the "Commission") was created by Congress under the Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV). *See United States v. Mistretta*, 488 U.S. 361, 362 (1989). Congress directed the Commission to promulgate guidelines and general policy statements for use by the federal

courts in determining criminal sentences, 28 U.S.C. §§ 991(a) and 994(a), and required the Commission to submit its initial guidelines for review by April 13, 1987. Pub. L. No. 98-473, § 235 (1984), *reprinted at* 18 U.S.C. § 3551; United States Sentencing Commission Sentencing Guidelines and Policy Statements 1.1 (Apr. 13, 1987) (the "1987 Guidelines").

After the prescribed 180-day period of congressional review, the 1987 Guidelines took effect automatically on November 1, 1987. *Id.* "Although the Commission was required only to submit `sentencing guidelines' to Congress, Pub.L. No. 98-473, § 235(a)(1)(B) 98 Stat. 1837, 2031-32, the Commission submitted commentary along with the guidelines, *see* United States Sentencing Commission, Sentencing Guidelines and Policy Statements (Apr. 13, 1987)." *United States v. Anderson*, 942 F.2d 606, 609 (1991); *see also* 1987 United States Sentencing Commission Annual Report 1.[6] Thus, Congress' approval of the submissions of the guidelines package that took effect on November 1, 1987 included its approval of the original commentary to section 3C1.1, stating that *"[a] defendant's denial of guilt is not a basis for application of this provision."* United States Sentencing Commission, Sentencing Guidelines and Policy Statements, § 3C1.1, comment. (Apr.13, 1987) (italics in original).

Moreover, by its approval of the Commission's 1990 reorganization of the application notes to section 3C1.1, Congress left no doubt that it did not intend to punish a defendant for a simple denial of guilt. *See* U.S.S.G. § 3C1.1,

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[6]28 U.S.C. § 994(w) requires the Commission "to submit to Congress at least annually an analysis of the operation of the guidelines." *Mistretta*, 488 U.S. at 309.

comment. (n.1) (West 1993) (App. C., n.347, amended November 1, 1990). The Commission is "under an obligation to periodically 'review and revise' the guidelines," *Mistretta*, 488 U.S. at 369 (quoting 28 U.S.C. § 994(o)), and to submit these amendments to Congress for review and approval. *Id.* (citing 28 U.S.C. § 994(p)). There is, however, no statutory requirement for congressional review of amendments to commentary. *See Anderson*, 942 F.2d at 609. In fact, this Court has noted that Congress may not review all amended commentary. *See Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993). Nevertheless, for all relevant years, the Commission has submitted to Congress its amendments to the commentary along with its amendments to the guidelines and policy statements. *See* 1989 United States Sentencing Commission Annual Report 19; 1990 United States Sentencing Commission Annual Report 23-24. Therefore, Congress has approved the amendments to the Official Commentary to § 3C1.1 of the Sentencing Guidelines. By approving the Sentencing Commission's 1987 Guidelines as well as the 1990 reorganization and clarification of U.S.S.G. § 3C1.1, Congress has made clear its unwillingness to punish a person for uttering a simple denial of guilt.

2. Congress' approval of the Commentary to section 3C1.1 demonstrates its assent to the exculpatory no doctrine.

Section 3C1.1 of the United States Sentencing Guidelines requires that a sentencing court add a two-level enhancement to a defendant's base offense level for obstruction of the administration of justice. Among the types of conduct to which the enhancement is intended to apply is the making of "a materially false statement to a law

enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, comment. (nn.2 & 3). However, Application Note 1 to the Commentary of that section states that *"[a] defendant's denial of guilt . . . is not a basis for application of this provision."* *Id.* at comment. (n.1) (italics in original).

It is abundantly clear from the language of the commentary that the Commission did not intend to punish a defendant for conduct constituting an exculpatory no. *See, e.g., United States v. Surasky*, 976 F.2d 242, 245 n.3 (5th Cir. 1992) ("The denial of guilt exception to U.S.S.G. 3C1.1 finds a rough analog in the so-called 'exculpatory no' doctrine established in [*Paternostro*]."); *United States v. Urbanek*, 930 F.2d 1512, 1515 (10th Cir. 1991) (holding that sentencing judge committed clear error by enhancing defendant's sentence for obstruction of justice on the basis of statements that "amounted to nothing more than a denial of guilt or an 'exculpatory no'"); *United States v. Brown*, 944 F.2d 1377, 1386 (7th Cir. 1991) (holding that "statements that go *beyond* the simple denial of guilt protected by the 'exculpatory no' doctrine . . . clearly warrant application of the § 3C1.1 enhancement") (emphasis added)); *see also, United States v. Johns*, 27 F.3d 31, 35 (2d Cir. 1994) (citing with approval *Surasky* and *Urbanek*).

In sum, when the activities of Congress are considered as a whole, rather than as discrete and unrelated parts, it is evident that it was never the intent of Congress that a false "no" response was to be a valid basis for conviction under 18 U.S.C. § 1001.

POINT III

THE SECOND AND FIFTH CIRCUITS' REJECTION OF THE EXCULPATORY NO DOCTRINE IS ERRONEOUS

The Second Circuit in this case and the Fifth Circuit in *Rodriguez-Rios* rejected the exculpatory no doctrine. That rejection was based on those courts' failure to properly consider and comprehend the foregoing compelling reasons favoring acceptance of the doctrine.

While the Second Circuit attempted to justify the fairness of Brogan's conviction by noting that the agents informed him that false statements were illegal, the court failed to point out that the notice was not given by the agents until *after* Brogan's "no" response. *Wiener*, 96 F.3d at 36, 40. Moreover, whereas the Second Circuit suggests that Brogan could have legally extricated himself by recanting his answer, *id.* at 36, that is most definitely not the law. Unlike, for example, 18 U.S.C. § 1623, which proscribes perjury before courts and grand juries, but specifically provides in subdivision (d) that a witness' recantation "shall bar prosecution," there exists no similar provision in 18 U.S.C. § 1001 and no case supports the notion that an actionable false statement under section 1001 is rendered unprosecutable if recanted.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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OCTOBER TERM, 1996

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether there is an exception to criminal liability under 18 U.S.C. 1001 for a false statement that consists of an "exculpatory no."

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1579

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 96 F.3d 35.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1996. Petitions for rehearing were denied on November 15, 1996. Pet. App. 16-17. The petition for a writ of certiorari was filed on February 13, 1997, and granted on June 9, 1997 (117 S. Ct. 2430). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. As in effect at the time of petitioner's false statement, 18 U.S.C. 1001 (1988) provided:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. As amended by the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 18 U.S.C. 1001 now provides:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully receiving

money from an employer, in violation of 29 U.S.C. 186(a)(2), (b)(1), and (d)(2), and of making a false statement to federal investigators, in violation of 18 U.S.C. 1001 (1988). He was sentenced to nine months' imprisonment, to be followed by two years of supervised release, and fined $4,000. The court of appeals affirmed. Pet. App. 1-13.

1. Petitioner was an officer of a union local. Pet. App. 2. On various occasions he accepted cash payments from JRD Management Corporation (JRD), a real estate management concern that employed members of his union. See Gov't C.A. Br. 9-17; Pet. App. 3-4. In October 1993, investigative agents from the Department of Labor and the Internal Revenue Service visited petitioner's home. Pet. App. 3; J.A. 1; Trial Tr. 520-521. After identifying themselves and informing petitioner that they were investigating JRD and various individuals, the agents informed petitioner that if he wished to cooperate with the investigation he should have an attorney contact the U.S. Attorney's Office. Pet. App. 3; J.A. 1-2. Petitioner then agreed to answer the agents' questions. Among other things, the agents asked petitioner whether he had received any cash or gifts from JRD, to which he responded "No." J.A. 2. The agents then told petitioner that they had seized JRD records indicating that he had received cash from the company, and they warned him that lying to federal agents in the course of an investigation was a crime. *Ibid.* The interview ended shortly thereafter, and petitioner did not modify his answers. Pet. App. 3-4; J.A. 2-3.

Petitioner was tried with several co-defendants. The jury found petitioner guilty of accepting unlawful

cash payments and of making a false statement to government investigators. See Pet. App. 2.

2. The court of appeals affirmed. Pet. App. 1-13. In its published opinion, the court rejected petitioner's attempt to rely on the "exculpatory no" exception that some courts have recognized as a defense to criminal liability under 18 U.S.C. 1001.[1]

At the time petitioner made his false statement to government investigators, Section 1001 generally prohibited, among other things, the making of "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001 (1988).[2] As the court of appeals explained (Pet. App. 5-6, 11-12), however, several courts have adopted some version of an "exculpatory no" exception to liability under Section 1001, holding generally that the law does not reach "false statements that are essentially exculpatory denials of criminal activity" (*id.* at 5). Although the court observed that the judicial exception "appears to have been fashioned from whole cloth[,] with the result that even among circuits that have adopted it, there is a considerable divergence concerning its content" (*id.* at 11), it agreed with petitioner that his statement to federal investigators in this case was a "true 'exculpatory no[]' as recognized in other circuits" (*id.* at 6). The

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[1] The court of appeals also issued an unpublished opinion (96-7999 Pet. App. A7-A10) rejecting various other arguments, none of which is at issue before this Court.

[2] In 1996, in response to this Court's decision in *Hubbard* v. *United States*, 514 U.S. 695 (1995), Congress amended Section 1001 to clarify its language and extend its scope. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459. The amended text is set out at pages 2-3, *supra*.

court declined, however, to recognize any version of the "exculpatory no" exception. *Ibid.*

The court found "no support" for such an exception in the language of Section 1001. Pet. App. 6-8, 11. Rejecting the argument that a defendant who "merely answers an inquiry in the negative" (*id.* at 6-7) has not made a "statement" within the meaning of that Section, the court reasoned that "[a] denial most certainly intends to convey information, * * * and is regarded by no one conversant with the English language as non-assertive" (*id.* at 7). Thus, the court held, "an exculpatory utterance, whether 'no' or something more elaborate, is a 'statement' within the purview of the statute." *Id.* at 8.

Similarly, the court's review (Pet. App. 8-10) of the history of Section 1001's enactment and amendment over the years disclosed no support for the conclusion reached by other courts that the law's "broad language generally prohibiting false statements of any sort cannot be taken at face value" (*id.* at 10). Although it recognized that some courts had sought to limit prosecution to false statements that would tend to "pervert the legitimate functions of Government" (*ibid.* (quoting *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962)), the court rejected that approach as based on "little more than a preference for a narrower over [a] broader statute," a choice that lies "solely within Congress's province" (Pet. App. 10). Finally, the court found no basis for believing that a plain-language interpretation of Section 1001 would infringe any right protected by the Fifth Amendment's privilege against compelled self-incrimination, because "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent." *Id.* at 11.

The court of appeals noted that Section 1001 "embodies a willfulness requirement." Pet. App. 12. The court did not decide whether the government must show that a defendant knew that the law prohibits false statements. It cautioned, however, that its rejection of the "exculpatory no" doctrine was not "intended to suggest that the mere denial of criminal responsibility would be sufficient to prove such an element." *Id.* at 13. The court also did not "exclude the possibility that a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent." *Ibid.* In this case, however, the court noted that "the agents testified that they informed [petitioner] that such false statements were illegal and that [petitioner] answered the questions in circumstances suggesting deliberation." *Ibid.* The court therefore affirmed petitioner's conviction. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner's false statement to federal agents investigating violations of federal law falls squarely within 18 U.S.C. 1001's prohibition of "any" knowing and willful "false, fictitious or fraudulent statements or representations" made "in any matter within the jurisdiction of any department or agency of the United States." Although the text admits of no exception, several courts of appeals have created and applied an "exculpatory no" exception to liability under Section 1001. This Court should reject that approach. A brief review of the lower-court cases demonstrates that the development and application of the exception has been far from uncontroversial, consistent, or stable over time. Those cases there-

fore provide no model for this Court to use in fashioning any extra-textual bar to prosecution. Indeed, the uncertain parameters of the exception developed by lower courts underscore the wisdom of adhering to the unqualified text of Section 1001. Cf. *Hubbard* v. *United States*, 514 U.S. 695 (1995).

The "exculpatory no" exception cannot be justified on policy grounds. The primary argument advanced for the exception is that a false denial of culpable conduct should not be punishable under Section 1001 because such a denial would not tend to "pervert the authorized function" of a governmental agency. There is no reason to assume, however, that such denials, as a category, will not tend to impede government investigators in their efforts to identify and stop wrongdoing; and there is no basis for inventing an "exculpatory no" defense to supplement the statute's textual requirement that any statement subject to prosecution be materially false. Nor is there logic to the distinctions drawn in the "exculpatory no" doctrine between false statements made in response to government inquiries and those made in communications initiated by the speaker, or between false denials and false assertions. Finally, it is difficult to accept the argument of petitioner's amicus that the opportunity to make false exculpatory denials of guilt will encourage frank communication with authorities. In any event, that argument, like the argument that Section 1001 in its present form is subject to prosecutorial "overreaching," cannot justify varying the plain language chosen by Congress in enacting Section 1001, and must be addressed to prosecutorial or legislative authorities, rather than to this Court.

Because the language of Section 1001 is clear, there is no need to examine its history to resolve this case. To the extent that it is relevant, however, that history indicates that when Congress has intended to restrict the prohibition now found in Section 1001 to certain types of falsehoods, it has expressly stated the relevant limitations. Nothing in the history of the present statute suggests any congressional intention to exclude from its scope any material false statement made to federal investigators. Petitioner's arguments based on legislative silence and ratification are particularly unpersuasive, in light of Section 1001's unqualified text and the unsettled nature of the law that petitioner claims Congress "ratified" when it amended the statute in 1996, after the Fifth Circuit had already repudiated its earlier adoption of the "exculpatory no" doctrine.

Finally, nothing in the Fifth Amendment either requires or justifies the imposition of judicial limitations on the scope of Section 1001. This Court has repeatedly rejected the argument that the Fifth Amendment ever confers a privilege to speak falsely, rather than simply to remain silent. A suspect questioned about a crime may either tell the truth or decline to answer, but in no event does he have a constitutionally protected right to lie. The option to remain silent is not "illusory" simply because a suspect may not be aware of it, or because remaining silent may have adverse consequences in investigative or judicial proceedings. Those factors can never justify lies. Because Section 1001 punishes only false statements, it offends no principle embodied in the Fifth Amendment.

ARGUMENT

PETITIONER'S FALSE STATEMENT TO FEDERAL INVESTIGATORS VIOLATED 18 U.S.C. 1001

A. The Plain Language Of Section 1001 Applies To Petitioner's False Statement

Section 1001 of Title 18 imposes criminal liability on any person who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. 1001 (1988).[3] Government agents identified themselves to petitioner, informed him that they wished to speak with him as part of an ongoing government investigation, and asked him whether he had ever received money or gifts from an employer that did business with his union. Petitioner responded that he had not, when in fact he had. His answer thus falls squarely within the statute's

[3] As recently amended (see note 2, *supra*), Section 1001 applies generally to anyone who "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully * * * makes any materially false, fictitious, or fraudulent statement or representation." The amended provision includes exceptions for certain matters within the jurisdiction of the Judicial and Legislative Branches. There is no exception for any matter within the jurisdiction of the Executive Branch, such as the investigation during which petitioner was questioned. See *United States* v. *Rodgers*, 466 U.S. 475 (1984) (conduct of a legally authorized investigation is a matter "within the jurisdiction" of the investigating agency).

prohibition.[4] Indeed, petitioner concedes that his statement was criminally false under a "literal" interpretation of Section 1001. Pet. Br. 5-6, 18-20.

Petitioner nonetheless contends that this Court should recognize an exception to liability under Section 1001 for any false statement that may be characterized as an "exculpatory no." While that argument finds support in some cases from the courts of appeals, it finds none in the language of the statute. To the contrary, Section 1001 extends to "any" false statement or representation. See *United States* v. *Gonzales*, 117 S. Ct. 1032, 1035 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). As the court of appeals held, a denial of culpable conduct, even if it consists only of the word "no," "most certainly intends to convey information," and is therefore a "statement" or "representation" within the normal meaning of those words. Pet. App. 7; see also *Webster's Third New International Dictionary* 2229 (1986) (defining "statement" to include "a single declaration or remark," "assertion"); *id.* at 1926 (defining "representation" to include "a statement or account esp. made to convey a particular view or impression of something with the intention of influencing opinion or action"); *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994) (en banc); *United States* v. *LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); cf. *United States* v. *Woodward*, 469 U.S. 105 (1985) (rejecting double jeopardy challenge to con-

[4] Petitioner has not contested that his false statement was made "knowingly and willfully" within the meaning of Section 1001.

viction under Section 1001 for falsely checking "no" on currency disclosure form).

As this Court concluded in *Hubbard* v. *United States*, 514 U.S. 695 (1995), courts are not at liberty to invent exceptions to Section 1001 that have no foundation in the text of that provision. *Id.* at 713 (plurality opinion) ("We think the text of § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception."); *id.* at 717 (concurring opinion) (rejecting "the Courts of Appeals' invention of a 'judicial function' exception" because "there is simply no basis in the text of the statute for that"). Nor is there any sound policy, historical, or constitutional reason for this Court to adopt any exception to liability under Section 1001 that is at variance with the text as written and enacted by Congress.[5]

B. The "Exculpatory No" Exception Created By Some Courts Of Appeals Is Neither Widely Accepted Nor Consistently Applied

As petitioner points out (Br. 7 & n.2), a number of lower-court cases have created and applied an "exculpatory no" exception to liability under Section 1001.

[5] Courts that have recognized an "exculpatory no" exception (see pages 12-19, *infra*) have candidly admitted that it has no explicit textual basis. See, *e.g.*, *United States* v. *Taylor*, 907 F.2d 801, 803 (8th Cir. 1990) ("It is evident, as the government contends, that the plain language of the statute does not contain an 'exculpatory no' exception."); *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975) ("The judiciary has also found it necessary to narrow the parameters of the statute through the 'exculpatory no' doctrine."); *United States* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) ("Extension of section 1001 to its literal breadth, however, cannot be justified by its legislative history.").

Petitioner (see Br. 7-8) and his amicus the National Association of Criminal Defense Lawyers (NACDL) (see Br. 12-13) briefly cite several such cases and imply that the courts of appeals have, over time, evolved a narrow, stable, and coherent doctrine that merits this Court's endorsement. A slightly more detailed review of the cases demonstrates, however, that no consistent and principled version of the "exculpatory no" exception exists in the lower courts, and it is doubtful that one could readily be formulated.

The "exculpatory no" exception was first adopted at the appellate level in *Paternostro* v. *United States*, 311 F.2d 298, 300-305 (1962), in which the Fifth Circuit distinguished (*id.* at 305) between defendants who "aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government" and one who made "mere negative responses to questions propounded to him by an investigating agent during a question and answer conference, not initiated by the [defendant]." On the basis of its "review of the legislative history of the statute and the purposes it seeks to accomplish," the court refused to allow prosecution of a defendant in the latter category. *Ibid.* The Fifth Circuit applied the "exculpatory no" doctrine in a number of cases that arose during the ensuing 30 years.[6] In *United States* v.

[6] See *United States* v. *Abrahams*, 604 F.2d 386 (1979) (statements concerning identity and criminal record made to magistrate at bail hearing); *United States* v. *Schnaiderman*, 568 F.2d 1208 (1978) (denial to customs officers concerning possession of currency); *United States* v. *Bush*, 503 F.2d 813 (1974) (statements to internal revenue agents); see also, *e.g.*, *United States* v. *Lambert*, 501 F.2d 943, 946 (1974) (en banc)

Rodriguez-Rios, 14 F.3d 1040 (1994), however, the court reconsidered the matter en banc and overruled *Paternostro*, concluding (*id.* at 1045) that the application of Section 1001 "should be determined by the text and not by a judicial reconstruction of its purpose."

Outside the Fifth Circuit and the Eleventh Circuit (which inherited the doctrine from the Fifth, see, *e.g.*, *United States* v. *Palzer*, 745 F.2d 1350, 1354 & n.8 (11th Cir. 1984)), the "exculpatory no" doctrine has been most frequently applied in the Ninth Circuit. In *United States* v. *Bedore*, 455 F.2d 1109, 1110 (1972), that court barred prosecution of an individual who gave a false name to a federal agent who was endeavoring to serve a subpoena. In subsequent cases, it elaborated a five-part test for application of the doctrine:

> (1) the false statement must be unrelated to a claim to a privilege or a claim against the government;
>
> (2) the declarant must be responding to inquiries initiated by a federal agency or department;
>
> (3) the false statement must not impair the basic functions entrusted by law to the agency;
>
> (4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and

(reaffirming doctrine in dictum); *United States* v. *Johnson*, 530 F.2d 52, 55 (exception not applicable where defendant voluntarily submitted false affidavit), cert. denied, 429 U.S. 833 (1976); *United States* v. *Krause*, 507 F.2d 113, 116-118 (1975) (exception not applicable to particular false testimony before administrative hearing examiner).

> (5) a truthful answer would have incriminated the declarant.

United States v. *Equihua-Juarez*, 851 F.2d 1222, 1224 (1988). Applying these criteria, the Ninth Circuit has, for example, permitted prosecution of a defendant who lied to a customs agent about where he had travelled, *United States* v. *Rose*, 570 F.2d 1358, 1364 (1978) (defendant "was claiming the privilege of entry [into the United States], and his statement potentially impaired the function of the Customs Service"), but precluded prosecution of a defendant who told false stories to Drug Enforcement Administration agents after being caught driving a truck carrying marijuana across the California border, *United States* v. *Medina de Perez*, 799 F.2d 540, 546 (1986) ("[A] competent government investigator will anticipate that the defendant will make exculpatory statements. A defendant who meets this expectation cannot possibly pervert the investigator's police function."). See also *United States* v. *Alzate-Restreppo*, 890 F.2d 1061, 1068-1069 (9th Cir. 1989) (opinion of Patel & Nelson, JJ.) (collecting cases).[7]

[7] In *United States* v. *Myers*, 878 F.2d 1142, 1143 (9th Cir. 1989), a private pilot "concocted" a story about losing his contact lenses during flight to explain why he had flown into prohibited airspace over President Reagan's California ranch. The court upheld the pilot's conviction for telling that story to agents of the Federal Aviation Administration, on the ground that that inquiry was purely administrative, but reversed his conviction for telling the same story to agents of the Secret Service. *Id.* at 1144. As in *Medina de Perez*, the court explained that "a good investigator will expect the accused to lie," and it was "unable to find that the appellant's falsehoods impaired or otherwise perverted the Secret Service's investigative function." *Ibid.*

The Ninth Circuit has explicitly rejected, at least in the context of post-arrest interrogation, the argument that there is "any meaningful distinction between an exculpatory 'no, I am not guilty,' and a more complete, evasive exculpatory response to a direct question." *Medina de Perez*, 799 F.2d at 546 n.9. Petitioner emphasizes that his statement to investigators in this case involved "the mere utterance of the word 'no'" (Br. 8) and that he "did not elaborate upon that response in any way" (Br. 4). For its part, amicus the NACDL disclaims support for an exception in any case in which the speaker "elaborate[s] upon a simple exculpatory denial by affirmatively misdescribing facts" (NACDL Br. 4). The court that has actually applied the "exculpatory no" doctrine most frequently, however, has "fail[ed] to see" the basis for any such distinction. 799 F.2d at 546 n.9.

Outside the Fifth, Ninth, and Eleventh Circuits, support for any version of a judicial "exculpatory no" exception is limited. The First Circuit's decision in *United States* v. *Chevoor*, 526 F.2d 178, 182-185 (1975), cert. denied, 425 U.S. 935 (1976), for example, is routinely cited as adopting the doctrine (*e.g.*, Pet. Br. 7 n.2; NACDL Br. 12), although *Chevoor* itself did not involve a prosecution under Section 1001. In its only other treatment of the doctrine, however, that court, sitting en banc, vacated a panel decision that had been based solely and "reluctantly" on *Chevoor*. *United States* v. *Poutre*, 646 F.2d 685, 686 (1980). Acknowledging that "[t]he judicial engrafting of an 'exculpatory no' exception on a facially all-inclusive statute" involved "the arbitrariness of a court-drawn line between affirmative and exculpatory negative responses," and expressing the hope that the provision would soon receive "legislative therapy," the court

pronounced itself "not eager to consider further development of the 'exculpatory no' doctrine." *Ibid.* The court therefore decided the case before it on a different ground. *Ibid.*

Similarly, the Seventh Circuit is regularly cited as being among those courts that have "embraced" the "exculpatory no" exception. See Pet. Br. 7 n.2; NACDL Br. 12-13. That court, however, has mentioned the doctrine only four times in the context of Section 1001, and has never applied it to bar a prosecution under that Section.[8] Most recently, in *Moser* v. *United States*, 18 F.3d 469, 473-474 (1994), the court described the exception as "largely a judge made creation in the federal judiciary below the Supreme Court," characterized its prior cases as having taken a "passing glance" at the doctrine and "provided a very small window of opportunity for [its]

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[8] In *United States* v. *Isaacs*, 493 F.2d 1124, 1158 (7th Cir.), cert. denied, 417 U.S. 976 (1974), the court held that the Fifth Circuit's decision in *Paternostro* had "no application" to "positive and affirmative" false statements to Internal Revenue Service investigators that went beyond a simple denial. *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980), likewise found the doctrine as articulated (at that time) by the Fifth Circuit inapplicable to the facts of a particular case. *King* characterized the doctrine as "a very limited exception to section 1001," restricted to "simple negative answers" given "under circumstances indicating that the defendant is unaware that he is under investigation" (*id.* at 674)—a qualification that would presumably make the doctrine inapplicable to petitioner. See J.A. 1-2 (agents informed petitioner that they wished to question him in connection with an ongoing investigation). *United States* v. *Picketts*, 655 F.2d 837, 842 n.3 (7th Cir.), cert. denied, 454 U.S. 1056 (1981), rejected an "exculpatory no" argument without discussion.

application * * * in this circuit," and again held it inapplicable on the facts before the court.

The Fourth Circuit adopted the "exculpatory no" doctrine, over a dissent, in *United States* v. *Cogdell*, 844 F.2d 179, 182-185 (1988), recognizing that it had been developed by courts "as an exception to the broad provisions of the statute" (*id.* at 182), but describing it as a "narrow yet salut[a]ry limitation on a criminal statute" (*id.* at 183). *Cogdell* also adopted the Ninth Circuit's five-part test for application of the exception. *Ibid.* In *United States* v. *Moore*, 27 F.3d 969, 978-980, cert. denied, 513 U.S. 979 (1994), however, the court, concerned by "the thin textual and constitutional foundations" of the doctrine, limited *Cogdell* to its facts, explicitly rejecting the Ninth Circuit's expansion of the doctrine to cover "even elaborate exculpatory tales" (*id.* at 979).[9]

The Eighth Circuit did not have occasion to pass on the matter until 1990, but it then joined the other circuits that had recognized some form of the doctrine, although it found it "evident * * * that the plain language of the statute" contained no such exception. *United States* v. *Taylor*, 907 F.2d 801, 803 (1990). The Tenth Circuit discussed the Fifth Circuit's case law (as it then stood) at some length in

[9] For another example of conflict in defining the contours of the doctrine, compare *Cogdell*, 844 F.2d at 184 ("The fourth requirement—that the statement be uttered in response to investigative inquiries rather than inquiries that represent routine exercises of administrative authority—touches the core of the reason for the 'exculpatory no' exception."), with *United States* v. *Payne*, 750 F.2d 844, 863 n.21 (11th Cir. 1985) ("We reject the distinction, relied upon in some 'exculpatory no' cases * * *, between 'investigative' and 'administrative' governmental inquiries" as "unhelpful").

United States v. *Fitzgibbon*, 619 F.2d 874, 876-881 (1980), although it concluded that the facts of that case "d[id] not 'fit the mold' of the 'exculpatory no' exception applied by the Fifth Circuit" (*id.* at 880), and it has neither applied nor discussed the doctrine since. The Third, Sixth, and District of Columbia Circuits have all explicitly noted that they have neither adopted nor rejected the doctrine, although the Sixth Circuit has discussed the issue at length and indicated that any application in that Circuit would be narrow. See *United States* v. *LeMaster*, 54 F.3d 1224, 1229 (1995), cert. denied, 116 S. Ct. 701 (1996) (discussing *United States* v. *Steele*, 933 F.2d 1313 (6th Cir.) (en banc), cert. denied, 502 U.S. 909 (1991)); *United States* v. *Barr*, 963 F.2d 641, 645-647 (3d Cir.) (noting that the doctrine is a "judicially created exemption from prosecution"), cert. denied, 506 U.S. 1033 (1992); *United States* v. *White*, 887 F.2d 267, 273-274 (D.C. Cir. 1989) (R.B. Ginsburg, J.). And in this case, of course, the Second Circuit joined the Fifth in rejecting the doctrine entirely.[10]

As this summary makes clear, the development and application of the "exculpatory no" doctrine in the

[10] The United States Court of Appeals for the Armed Forces has refused to adopt an "exculpatory no" exception to 10 U.S.C. 907, the military analogue to 18 U.S.C. 1001. *United States* v. *Solis*, 46 M.J. 31 (1997). The Federal Circuit, on the other hand, has recently fashioned a similar doctrine for use in certain federal employee discipline cases, holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." *King* v. *Erickson*, 89 F.3d 1575, 1585 (1996). This Court granted certiorari to review the Federal Circuit's decision in *Erickson*, see 117 S. Ct. 2506 (1997), and the case is presently pending (No. 96-1395).

courts of appeals has been far from uncontroversial, consistent, or stable over time. That precedent therefore furnishes no clear guidance for this Court on the foundation or scope of any such exception. Nor, as we discuss below, are there sound policy reasons to support a "judicially created exemption from prosecution" under Section 1001. *Barr*, 963 F.2d at 645.

C. Policy Arguments Do Not Support Judicial Creation Of An "Exculpatory No" Exception

Petitioner argues (Br. 8-11) that his "simple denial of guilt" should not be treated as a "statement" within the meaning of Section 1001 because it "could not, and did not, pervert the authorized function of any governmental department or agency." That argument is unpersuasive. It rests on the remarkable—and false—premise that federal investigators should expect the people they interview to lie, and that false denials of wrongdoing therefore do not impede the discharge of investigative duties. See, *e.g.*, Pet. Br. 9-10; *United States* v. *Myers*, 878 F.2d 1142, 1144 (9th Cir. 1989) ("a good investigator will expect the accused to lie") (discussed at note 7, *supra*); *Cogdell*, 844 F.2d at 184; see also *Alzate-Restreppo*, 890 F.2d at 1068 (opinion of Patel & Nelson, JJ.) (describing this line of analysis as "disturbing"). Yet a false denial can only be intended to influence the investigator's understanding of the facts, to persuade him (falsely) of the speaker's innocence, and to divert attention elsewhere. While such a denial may have little chance of success in some cases, in others it may significantly impede the search for truth. See also *United States* v. *Capo*, 791 F.2d 1054, 1069 (1986) ("The statute contains no requirement that the defendants' misrepresentation be successful, and we

decline to read one into it."), vacated in part on other grounds, 817 F.2d 947 (2d Cir. 1987) (en banc). Any argument that a particular false statement lacked any potential to affect the functioning of the investigating agency is properly addressed, instead, as a challenge to the materiality of the false statement. See *United States* v. *Gaudin*, 515 U.S. 506, 509 (1985) (materiality requires a showing to the jury that the statement had the natural tendency to influence, or was capable of influencing, official action).

Nor is there merit to the suggestion that there is a difference, for purposes of Section 1001, between false statements made in response to government inquiries and those made in communications initiated by the speaker, or between false denials and false assertions. See, *e.g.*, Pet. Br. 9-10; *Cogdell*, 844 F.2d at 184; *Paternostro*, 311 F.2d at 305 (refusing to apply Section 1001 where defendant "did not aggressively and deliberately initiate any positive or affirmative statement"). Nothing in the language of the statute suggests or supports such distinctions; and there is no basis for the categorical conclusion that false denials in response to an investigator's questions pose any less serious risk of interference with the proper functioning of government than do a variety of other false statements, such as misleading affirmative responses, or false declarations made in applications for benefits or on forms designed to implement disclosure requirements. See, *e.g.*, *Bedore*, *supra* (precluding prosecution of defendant who gave false name to federal agent attempting to serve subpoena); see also *Poutre*, 646 F.2d at 686 (describing the affirmative/negative distinction as "arbitrar[y]"); compare *Woodward*, *supra* (false "no" on currency disclosure form used at border); *United States* v. *Knox*, 396 U.S. 77,

82-83 (1969) (discussing similar attempt to distinguish "voluntarily filed" statement from one filed under legal compulsion). In *United States* v. *Rodgers*, 466 U.S. 475 (1984), this Court held that a federal criminal investigation is a "matter within the jurisdiction of any department or agency of the United States" within the meaning of Section 1001. If anything, a false response to a question posed during the course of a preexisting investigation is even more clearly made "in" the relevant governmental "matter" than was the statement at issue in *Rodgers*, which led federal officers to initiate the criminal investigation that this Court held was "surely" a "matter" within the scope of the statute (466 U.S. at 479).

Petitioner's amicus argues that recognition of the "exculpatory no" exception would actually "promote accurate information sharing with the government." NACDL Br. 19. It is entirely speculative, and somewhat counterintuitive, to contend that there exist sophisticated informants who would speak with government agents if, but only if, they are at liberty to make false exculpatory denials (limited to the word "no," see *id.* at 4-5) without fear of prosecution; if they exist, it is doubtful that the benefits of catering to them would outweigh the costs of weakening the principle that statements made to federal authorities must be truthful. In any event, if there is such a balance to be struck, it is up to investigative authorities themselves to strike it. See *United States* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc) ("[T]he potential for overzealous application of § 1001 * * * poses a limited threat because investigators, to whom access to information is critically important, would not want to gain a reputation for routinely

seeking to prosecute complainants and informants who give false information.").

Finally, petitioner (Br. 18-20) and his amicus (Br. 21-23) suggest that an "exculpatory no" exception to Section 1001 is desirable to prevent investigative or prosecutorial "overreaching" (NACDL Br. 21). Like any broad criminal prohibition that is applicable in a wide variety of circumstances, Section 1001 gives rise to opportunities for the exercise of enforcement discretion. That discretion is traditionally and properly exercised, however, by administrative and prosecutorial authorities within the Executive Branch, not by the "judicial engrafting of an * * * exception on a facially all-inclusive statute." *Poutre*, 646 F.2d at 686. Policy considerations such as those petitioner suggests (Br. 8-10, 19-20), or those reflected in the Ninth Circuit's five-factor "exculpatory no" test (see *Equihua-Juarez*, 851 F.2d at 1224), might or might not supply useful general guides for the exercise of prosecutorial discretion.[11] But like the

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[11] As we noted in our brief at the petition stage (at 8-9 & n.4), the Department of Justice has advised its prosecutors that in general "it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government." United States Attorney's Manual § 9-42.160 (adopted Feb. 12, 1996) (reprinted in the appendix to our brief at the petition stage, at 3a-4a). That statement is a guideline for use by the Department's attorneys in exercising prosecutorial discretion; it does not represent the Department's construction of Section 1001, nor does it create judicially enforceable rights. See United States Attorney's Manual § 1-1.100 (1988); *United States* v. *Piervinanzi*, 23 F.3d 670, 682-683 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994); *United States* v. *Craveiro*, 907 F.2d 260, 264 (1st Cir.), cert. denied, 498 U.S. 1015 (1990). The policies underlying the "exculpatory no" cases have also

analogous arguments made and rejected in *Rodgers*, 466 U.S. at 482-484, and in *United States* v. *Yermian*, 468 U.S. 63, 74-75 (1984) (defendant need not have "actual knowledge" of federal agency jurisdiction over matter in which false statement is made), those policy concerns are "not sufficient to overcome the express statutory language of § 1001." *Id.* at 74; see also *Hubbard* v. *United States*, 514 U.S. 695, 702 (1995) (overruling *United States* v. *Bramblett*, 348 U.S. 503 (1955), which "erred by giving insufficient weight to the plain language" of Section 1001); *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941) (1934 amendments to what is now Section 1001 were intended to broaden the statute, and "[w]e see no reason why this apparent intention should be frustrated by construction").

As in *Yermian*, petitioner's policy arguments involve no contention that Congress "lacks the power to impose criminal sanctions for deliberately false statements submitted to a federal agency"; and that is "precisely what Congress has done here." 468 U.S. at 74-75. Beyond the question of constitutional power, any effort to carve out an "exculpatory no" exception from Section 1001 "amount[s] to little more than a preference for a narrower over [a] broader statute." Pet. App. 10. As this Court has already made clear, however, "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress," not the courts. *Rodgers*, 466 U.S. at 484.

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formed the basis of legislative proposals—none of which has been enacted. See *Rodriguez-Rios*, 14 F.3d at 1048 n.19 (noting Congress's failure to enact certain proposed limitations); *Poutre*, 646 F.2d at 686 & n.2 (describing proposals then pending).

D. Nothing In The Legislative History Of Section 1001 Warrants Judicial Creation Of An "Exculpatory No" Exception

Because the language of Section 1001 is clear, there is no need to examine the history of the statute to resolve this case. This Court has previously reviewed that history in considerable detail, however, most recently in *Hubbard* v. *United States*, 514 U.S. at 703-708. See also *Yermian*, 468 U.S. at 70-74; *Bramblett*, 348 U.S. at 504-508; *Gilliland*, 312 U.S. at 91-96. To the extent that it is relevant here, the evolution of the statute demonstrates that when Congress has intended to restrict the prohibition now contained in Section 1001 to certain types of falsehoods, it has stated the limitations expressly.

The "earliest statutory progenitor" of the present provision prohibited false statements only if made "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." *Hubbard*, 514 U.S. at 704-705 (quoting Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696). A 1918 amendment added a proscription against false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government." 514 U.S. at 705-706 (quoting Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015). In 1934, however, Congress broadened the statute by eliminating any restriction to cases involving pecuniary or property loss to the government. *Gilliland*, 312 U.S. at 92-93 (citing Act of June 18, 1934, ch. 587, 48 Stat. 996). The provision was reorganized and reenacted without pertinent change in 1948, when it was first codified at 18 U.S.C. 1001.

For present purposes, the salient point is that nothing in this history suggests any congressional

intention to exclude from the scope of the present Section 1001 any kind of material false statement made to federal criminal investigators. If it had intended any such limitation, Congress was capable of enacting it explicitly. As in *Yermian*, the fact that it did not do so "provides convincing evidence that the statute does not require" proof of any element beyond those stated in its text. 468 U.S. at 73; see also *Gilliland*, 312 U.S. at 93; *Rodriguez-Rios*, 14 F.3d at 1048 ("[W]hen Congress wished to restrict the scope of § 1001 to statements made for certain purposes, it did so explicitly.").

Petitioner and his amicus point to no evidence in the drafting or evolution of the language of Section 1001 itself to support their position. Petitioner contends instead (Br. 20-29) that Congress has ratified or acquiesced in the judicial gloss on Section 1001 by failing to amend the statute to repudiate the "exculpatory no" doctrine, by reenacting that Section in 1996, and by failing to countermand commentary to the United States Sentencing Guidelines concerning the obstruction-of-justice sentencing enhancement governed by Guidelines § 3C1.1. See NACDL Br. 11-18 (arguing ratification). Those arguments are without merit.

This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 117 S. Ct. 921, 929 (1997) (internal quotation marks and brackets omitted); see also, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 121-122 (1994); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-187 (1994). Similarly, "failed legislative proposals" of the type petitioner cites (Br. 23-24) "are 'a

particularly dangerous ground on which to rest an interpretation of a prior statute' "; the failure to adopt them "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Central Bank*, 511 U.S. at 187. Moreover, whatever weight congressional inaction might, under some circumstances, lend to one alternative interpretation of an ambiguous statute, it can lend none to a judicial gloss, like the "exculpatory no" doctrine, that varies or contradicts the plain language of the statute itself. "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible." *Brown*, 513 U.S. at 121-122 (quoting *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969)).

Although congressional reenactment of a statute that has been given a "consistent judicial construction" can, under appropriate circumstances, provide a useful guide to interpretation, see *Central Bank*, 511 U.S. at 185; *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), that principle has no application in this case. To begin with, the varied articulations and applications of the "exculpatory no" doctrine in the courts of appeals described above (see pages 12-20, *supra*) "hardly [reflect] the sort of uniform construction that Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 532 (1994) (discussing Copyright Act of 1909). Moreover, by the time of the 1996 revision and reenactment of Section 1001 cited by petitioner (Br. 23-25), the first court of appeals to adopt the "exculpatory no" doctrine had reconsidered the matter en banc and repudiated it. *Rodriguez-Rios*, *supra*. The courts of appeals were therefore divided not only as to the contours of the doctrine, but as to whether it should be recognized at all. "It would

thus be impossible to say which view Congress might have endorsed." *Wells*, 117 S. Ct. at 930; see *Fogerty*, 510 U.S. at 531-532.

Petitioner and his amicus cite no evidence that Congress specifically considered the "exculpatory no" doctrine when it revised Section 1001 in 1996, and we are aware of none. See *Brown*, 513 U.S. at 121 (where there is no evidence that Congress was aware of a regulatory interpretation, "we consider the . . . re-enactment to be without significance"); *Zuber*, 396 U.S. at 185 n.21. There is even less reason to infer congressional approval of the "exculpatory no" exception to Section 1001—effectively amending a federal criminal statute—from Congress's failure to countermand or amend an "application note" drafted by the United States Sentencing Commission to accompany its Guideline for the imposition of an obstruction-of-justice enhancement in federal criminal sentences.[12] See Pet. Br. 26-29. Moreover, as with acquiescence, while reenactment may aid in the resolution of ambiguity, it cannot vary the terms of a clear statute. "[W]here the law is plain, subsequent reenactment does not constitute an adoption of a previous * * * construction." *Brown*, 513 U.S. at 121 (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). As this Court specifically cautioned in *Hubbard*, 514 U.S. at 708, "[c]ourts should not rely on inconclusive statutory history as a basis for refusing

[12] The application note in any event does not adopt an "exculpatory no" safe harbor for false denials of criminal liability, but simply requires a showing of actual obstruction of justice to support a sentence enhancement for unsworn false statements. See Guidelines § 3C1.1 & Application Note 3(g).

to give effect to the plain language of an Act of Congress."

E. The Fifth Amendment Does Not Require Or Justify The Creation Of A Judicial Exception To Section 1001

Finally, petitioner argues (Br. 11-17) that applying Section 1001 to a false denial of guilt made to federal investigators would violate "the spirit of the Fifth Amendment" (Br. 17), because the potential for such liability would leave a "cornered suspect" on the horns of a "cruel trilemma," facing a choice among self-incrimination, violation of Section 1001, or the invocation of a right to remain silent that petitioner characterizes as "illusory" (Br. 11-12). See, *e.g.*, *Cogdell*, 844 F.2d at 182-183; *United States* v. *Payne*, 750 F.2d 844, 861-866 (11th Cir. 1985). The difficult choice that may face a suspect "cornered" by federal investigators arises, however, from any potential that the truth has to incriminate the suspect, and from inherent limits on the protection provided by the Fifth Amendment privilege against compelled self-incrimination. That quandary provides no basis for imposing non-textual limitations on Congress's broad criminal prohibition against lying to government agents.

A suspect questioned by a government agent has three choices. There is the option of telling the truth—a course that may have significant benefits, not only for the government and the public, but for the suspect himself.[13] There is also, de facto, the

[13] The record suggests (J.A. 1-2) that federal agents approached petitioner at least in part to seek his cooperation in an ongoing investigation. Of course, potential defendants who

option of lying to the investigator, perhaps in the hope that suspicion will be deflected; that delay may provide opportunities to warn co-conspirators, to conceal or destroy evidence, or to escape arrest; or that authorities will fail to discover sufficient other evidence to permit successful prosecution. The government has an obvious and substantial interest in discouraging the use of that option by imposing additional criminal sanctions on those, like petitioner, who can be proved to have selected it.

The suspect's third option is to remain silent. See *Rodriguez-Rios*, 14 F.3d at 1050; *Steele*, 933 F.2d at 1321. Petitioner terms that option "illusory" (Br. 12) because a suspect may not be aware of it, or may fear that silence will be used against him—that is, that refusal to answer a question may suggest that there is a reason for the refusal. Because, petitioner argues, the suspect has no "viable option" (Br. 15) to remain silent, he must be protected from prosecution for a false denial of guilt, in order to protect his Fifth Amendment right not to be forced to incriminate himself (Br. 16-17). That argument is unsound.

This Court has repeatedly rejected the proposition that the Fifth Amendment ever confers a privilege to lie, rather than simply to remain silent. There is no "privilege to answer fraudulently a question that the Government should not have asked"; rather, "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly

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agree to cooperate and who provide information that assists the government in fully uncovering and extirpating criminal activity are often treated more leniently, with respect to both charging and sentencing, than others who refuse to cooperate or to admit their criminal responsibility.

and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969); see also *United States* v. *Wong*, 431 U.S. 174, 178 (1977) ("[E]ven the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury.").[14]

Even if a suspect's silence may later be used against him, there is no support for the recognition of a constitutional right to lie. In *United States* v. *Knox*, 396 U.S. 77 (1969), a taxpayer argued that he was forced to provide false information on a return because the truth would have incriminated him and silence (*i.e.*, failure to file any return) would itself have been a crime. In rejecting the taxpayer's constitutional challenge to a prosecution under Section 1001, this Court simply noted that in selecting a third alternative—the filing of false information—he pursued "a course that the Fifth Amendment gave him no privilege to take." 396 U.S. at 82. Petitioner's claim is even weaker than Knox's, because under no circumstances could petitioner's mere silence have made

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[14] See also *United States* v. *Dunnigan*, 507 U.S. 87, 96 (1993) ("[A] defendant's right to testify does not include a right to commit perjury."); *United States* v. *Apfelbaum*, 445 U.S. 115, 117 (1980) ("invocation of the Fifth Amendment privilege * * * allows a witness to remain silent, but not to swear falsely"); *United States* v. *Mandujano*, 425 U.S. 564, 584 (1976) (plurality opinion) (witness "was free at every stage to interpose his constitutional privilege against self-incrimination, but perjury was not a permissible option"); *Knox*, 396 U.S. at 81-82 (no Fifth Amendment privilege to file false tax return); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) (otherwise excludable statement could be used to impeach testifying defendant, because "[h]aving voluntarily taken the stand, petitioner was under an obligation to speak truthfully").

him subject to criminal prosecution. Cf. *Wong*, 431 U.S. at 179.[15]

Nor is the option of remaining silent "illusory" because agents may pay a surprise visit to a suspect's home and begin accusatory questioning without warning the suspect of his rights. Pet. Br. 12. Non-custodial questioning has never been thought to impose pressures that are tantamount to custodial interrogation, and no warning is required when officials conduct a voluntary, consensual interview. *E.g.*, *Beckwith* v. *United States*, 425 U.S. 341, 344-347 (1976); see also *Stansbury* v. *California*, 511 U.S. 318, 323 (1994) (per curiam). Nor does a suspect who is not in custody acquire any right to lie on the theory that the absence of warnings renders him incapable of exercising the right to remain silent. In *United States* v. *Wong*, this Court rejected the claim of a grand jury witness that her perjury was justified by the Fifth Amendment because, without adequate warning of her right to remain silent, her only choices were self-incrimination and lying: "[T]he Fifth Amendment * * * grants a privilege to remain silent without risking contempt, but it does not endow

[15] Such silence might or might not be admissible as substantive evidence of guilt in an ensuing criminal prosecution. See *United States* v. *Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (discussing disagreement in cases addressing that issue). The resolution of that issue, however, has no bearing on whether the Fifth Amendment protects lying as an option. Possible evidentiary consequences of silence may always exert pressure on a suspect to talk. Cf. *Jenkins* v. *Anderson*, 447 U.S. 231, 235-238 (1980) (pre-arrest silence may be used to impeach a defendant who waives Fifth Amendment privilege by testifying at trial). It has never been suggested, however, that that form of pressure would justify a right to make false exculpatory denials.

the person who testifies with a license to commit perjury. The failure to provide a warning of the privilege * * * does not call for a different result." 431 U.S. at 178 (citation omitted).

In sum, whatever shelter the Fifth Amendment gives to silence, it does not protect an individual who chooses to speak, but speaks falsely. Section 1001 punishes only "intentional and deliberate lies." *Yermian*, 468 U.S. at 74. In so doing, it infringes no right protected by the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October Term, 1997

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner respectfully submits this brief in reply to the government's brief, which counsel received on September 29, 1997.

ARGUMENT IN REPLY

THE GOVERNMENT'S "PLAIN LANGUAGE" ARGUMENT IS ERRONEOUS BECAUSE IT IGNORES WHAT THIS AND OTHER COURTS HAVE FOUND TO BE THE PURPOSE OF 18 U.S.C. § 1001.

While making "a fortress out of the dictionary," *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), the government argues that the "plain language" of section 1001 embraces Petitioner's conduct, and that this Court should look no further in deciding this case. Respondent's Brief (hereinafter "Res. Br.") at 10-12.

The government's argument fails to recognize that the "plain language" approach is entirely inappropriate where its use would produce results "foreign to the legislative purpose," *Sorrells v. United States*, 287 U.S. 435, 450 (1932), or "'frustrate Congress's clear intention,'" *Hubbard v. United States*, 115 S. Ct. 1754, 1759 (1995) (quoting *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1778 (1994) (Souter, J., dissenting)). Because the approach urged by the government runs afoul of these principles, it must be rejected.

The purpose for which section 1001 was enacted, and that it is intended to serve, is beyond controversy. Section 1001 "was designed 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices [the statute] described.'" *United States v. Woodward*, 469 U.S. 105, 109

(1985) (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)). The government's emphasis on dictionary definitions is inappropriate in this case: by taking a strict literalist approach to the statute, the government effectively has divorced the statute's meaning from its intended purpose.[1] "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

[1]Even pursuant to the strict literalist approach, Brogan's simple "no" response would not fall under the proscription of the language of the applicable version of section 1001. That statute referred to "statements or representations," in the plural, rather than to a "statement or representation," in the singular. Brogan's "no" cannot be interpreted either as a "statements" or as a "representations." *Cf. Metropolitan Stevedore Company v. Rambo*, 515 U.S. 291, 296-98 (1995) ("The use of 'conditions,' a word in the plural, suggests that Congress did not intend to limit the bases for modifying awards to a single condition . . . .").

THE GOVERNMENT'S SURVEY OF EXCULPATORY NO JURISPRUDENCE, PURPORTEDLY ANALYZING THE NUANCES OF VARIATION AMONG THE CIRCUITS ACCEPTING AND APPLYING THE DOCTRINE, IS GRATUITOUS AND IRRELEVANT: PETITIONER'S SIMPLE "NO" RESPONSE WOULD HAVE UNDISPUTEDLY BARRED HIS CONVICTION IN ANY OF THOSE CIRCUITS.

After noting the forty-year history of the exculpatory no doctrine's acceptance in the federal courts, Petitioner, in his brief, states:

> The courts provided numerous well-reasoned and valid justifications for the proposition that an exculpatory no response is not cognizable under 18 U.S.C. § 1001; while the criteria, or tests, employed by the different courts had a certain degree of variation, Brogan's conduct, his verbal "no" response, and the context in which it occurred, would have been found non-criminal, as a matter of law, by any of the courts that had decided the issue.

Petitioner's Brief (hereinafter "Pet. Br.") at 4-5. Petitioner continues:

> Although there are variations in scope and differences in the legal tests employed by the circuits, undoubtedly all of the courts that have recognized the doctrine would have found that the proscription of the statute did not include Brogan's conduct, the mere utterance of the word "no."

Pet. Br. at 7-8.

Ignoring these passages, the government launches into a lengthy dissertation, consuming one-third of its Argument, endeavoring to establish what Petitioner has never disputed, and in fact has clearly acknowledged: that "there are variations in scope and differences in the legal tests employed by the circuits."

Because the analysis is so utterly irrelevant, yet discussed at such great length, the only sense that can be made of its inclusion in the government's brief is that it is calculated to create apprehension that should this Court embrace the doctrine there would be the need to fashion a complicated rule or test whose interpretation by the lower courts would wreak havoc and generate endless litigation. Nothing could be further from the truth.

To embrace the exculpatory no doctrine in a sound and sensible way that is narrow, coherent, free of complexity in application, and yet fully addresses the concerns that have been voiced by courts and commentators, all this Court need hold is that section 1001 does not reach conduct that consists merely of an individual's "no" response when asked if he or she has committed a specified crime.

THE RELIANCE BY THE GOVERNMENT ON *BRYSON*, *WONG* AND *KNOX* IS MISPLACED: THOSE CASES ARE READILY DISTINGUISHABLE FROM PETITIONER'S.

Petitioner was the victim of a surprise visit by agents who, without first advising him of his right to remain silent or that it was a crime to lie to their inquiries, asked if he had accepted bribes. His "no" response was the product of these very specific circumstances, which constitute the operative facts of this case. Based upon these operative facts, Petitioner argues in his main brief that his "no" response was not actionable.

In a flawed effort to undermine the validity of Petitioner's argument, the government relies upon *Bryson v. United States*, 396 U.S. 64 (1969), *United States v. Knox*, 396 U.S. 77 (1969), and *United States v. Wong*, 431 U.S. 174 (1977). The reliance is misplaced, as each of these cases is readily distinguishable from Petitioner's.

In *Bryson*, the factual basis for the defendant's section 1001 conviction was his filing of an affidavit with the NLRB in which he falsely stated that he was not a communist. Bryson challenged his conviction on the ground that the statute requiring the filing of the affidavit was unconstitutional. The Court affirmed the conviction, holding that the constitutionality of the filing statute was not relevant to the validity of the conviction.

In *Knox*, the defendant's section 1001 conviction was based upon his filing a tax return, pursuant to the wagering tax laws, that contained false information. Like Bryson, Knox challenged his conviction on the ground that the law requiring the filing was unconstitutional. In *Knox*, the Court also held that the constitutionality of the filing statute was not relevant to the validity of his conviction.

In *Wong*, at issue was the propriety of the defendant's perjury conviction under 18 U.S.C. § 1623. The defendant, whose knowledge of English was limited, testified falsely before a grand jury. Though advised of her Fifth Amendment right against self-incrimination, the Court found that she did not understand the warning and that she believed she was required to answer all questions posed. However, the Court found that Wong understood the oath she had taken to tell the truth, and that she knew that lying to the grand jury constituted punishable criminal conduct.

In neither *Bryson* nor *Knox* were the false statements the product of the defendant having been taken by surprise by federal agents and cornered. The defendants in both cases made the statements, which were written, in an atmosphere apparently free of any coercive influence or intimidation. In *Bryson*, the false statement appeared in an affidavit, a document whose form unequivocally conveys to the affiant that it is a sworn statement, and, consequently, that false statements appearing in it can be the subject of criminal prosecution. This Court may take judicial notice that the tax form in *Knox*, undoubtedly, also contained a warning that false statements are punishable by criminal sanctions. Most significantly, in both *Bryson* and *Knox* the defendants had viable and traditional ways of contesting the constitutionality of the statutes that required the filings of the documents they submitted: namely, the commencement of legal proceedings. In sum, no valid comparison can be made between the cases of *Bryson* and *Knox* on the one hand, and that of Petitioner on the other.[2]

---

[2]In *United States v. Payne*, 750 F.2d 844 (8th Cir. 1985), the court rejected the notion that *Bryson* or *Knox* presented a bar to application of the exculpatory no doctrine. Regarding *Bryson*, the *Payne* court stated

Wong also is easily distinguishable from Petitioner's case. The defendant in *Wong* was not the victim of a surprise knock in the night by federal agents, with that scenario's inherent aura of intimidation. She was before the grand jury pursuant to a subpoena, which provided her with advance notice of the time and place for her questioning. While she did not understand that she had a Fifth Amendment right to refuse to answer questions, it is undisputed that "she took the oath to the tell the truth," *id.* at 178, with its accompanying solemn ritual, understood its significance, and entertained no doubt that false responses to questions posed could result in a perjury prosecution. Moreover, the fact that *Wong* was a perjury prosecution is not an insignificant distinguishing factor. Perjury has the potential to undermine our very system of justice. *See, e.g., In re Michael*, 326 U.S. 224, 228 (1945) (Black, J.) ("All perjured relevant testimony is at war with justice . . . .").

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that the "defendant's constitutional challenge was based on the Bill of Attainder Clause, the First Amendment, and the Due Process Clause, not the Fifth Amendment self-incrimination privilege." *Id.* at 862. Regarding *Knox*, the *Payne* court stated that "[t]he Court simply held that the claim should not have been resolved at the pleading stage." *Id.* Additionally, the statements at issue in *Bryson* and *Knox* were made not in response to investigative inquiries, but rather to inquiries representing "routine exercises of administrative authority." *See United States v. Cogdell*, 844 F.2d 179, 184 (4th Cir. 1988) ("False statements that pervert an agency's routine administrative functions are the specific target Congress intended the statute to reach, *United States v. Gilliland*, 312 U.S. [at 93], while the exception was created to protect negative responses to interrogation by a criminal investigator.") *See also United States v. White*, 887 F.2d 267, 274 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("[T]he doctrine, in any event, does not shield from prosecution under section 1001 false responses to questions in an administrative rather than investigative proceeding.").

Thus, the government's reliance on *Wong* to support Petitioner's conviction is considerably wide of the mark.

CONCLUSION

For the foregoing reasons, and those previously argued in Petitioner's Brief on the Merits, Petitioner requests this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 96-1579

In the Supreme Court of the United States
OCTOBER TERM, 1997

JAMES BROGAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should the "exculpatory no" doctrine, recognized by Courts of Appeals for seven circuits as a complete defense to a false statement charge under 18 U.S.C. § 1001, but rejected below by the Second Circuit, be embraced by this Court?

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This *amicus curiae* brief is submitted in support of Petitioner, James Brogan. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. [1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure that criminal statutes are construed and applied fairly and in accordance with due process.

The NACDL files this *amicus curiae* brief to urge the Court to find that a person may not be convicted of a false statement crime, 18 U.S.C. § 1001, for simply stating "no" in response to a question posed by a federal investigator, where a truthful answer to the question would incriminate the person. This "exculpatory no" doctrine was the law in the vast majority of federal courts of appeals without

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

contrary authority for nearly thirty-five years, and was recently ratified as a correct interpretation of the statute by Congress.

The NACDL supports the application of this "exculpatory no" limitation on § 1001 for policy reasons consistent with its mission. Such a limitation encourages witnesses to share truthful information with the government (at least on matters short of those which may incriminate), because the interview itself will not pose as great a threat of prosecution. It also curbs law-enforcement abuse and prosecutorial overreaching — topics in which the NACDL and its members share a particularly strong interest.

SUMMARY OF ARGUMENT

Petitioner James Brogan was a union official suspected by the government of receiving bribes. Federal agents arrived unannounced at his home to question him. After answering general questions about his position with the union, Mr. Brogan responded "no" to a direct question whether he had ever received any money or gifts from JRD Management Corporation. Mr. Brogan petitioned this Court to answer the question whether his exculpatory denial could be prosecuted as a false statement under 18 U.S.C. § 1001.

At the time of Mr. Brogan's conviction, Section 1001 punished "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations." Starting in 1962, eight federal courts of appeals had held that § 1001 does not apply to a person who falsely denies wrongdoing in response to an accusatory question posed by a federal agent, in an investigative encounter initiated by that agent. Not until 1994 — sixty years after the passage of the relevant statutory

language — did any court of appeals disagree with this unanimous interpretation.

The legislative history of § 1001 indicates that Congress did not intend to punish a person cornered in the course of an investigation who, surprised by a direct accusation, denies complicity in a crime. Congress' motivation in enacting the statute was to protect the government from falsehoods designed to elicit a benefit from the government or to pervert government functioning. A simple denial of complicity in crime does neither. It merely requires government agents to collect information elsewhere, without affirmatively leading those agents astray with false leads about the conduct at issue.

After eight courts of appeals had held that § 1001 does not apply to denials of questions designed to elicit criminal admissions, Congress reenacted § 1001 in relevant part. Congress was well aware of the courts' longstanding interpretation. Its reenactment of the relevant language in § 1001, without change, manifested its acquiescence in the limitations the judiciary had inferred from that broad language. Indeed, in the course of reenacting the relevant language, Congress expressly stated its intent to carry forward these well-recognized limitations.

In addition to historical indications of legislative intent, sound policy reasons support the conclusion that § 1001 does not proscribe false exculpatory denials. By the passage of § 1001, Congress sought to achieve broad public cooperation with the regulatory goals of government. The exculpatory no limitation promotes this objective by encouraging witnesses to provide truthful information to the government, at least up to the point where the witness's answers would actually incriminate. Eliminating the limitation would create a disincentive for witnesses to share

any pertinent knowledge with the government. Where a simple exculpatory denial could itself lead to criminal prosecution, a rational witness with any conceivable criminal exposure would have little incentive to cooperate with the government *at all*.

Eliminating the exculpatory no exception would also encourage overreaching by law-enforcement agents. Where a statute-of-limitations bar or lack of sufficient proof on a particular element made it impossible to *prove* a crime, agents would have it within their power to *manufacture* one — by simply asking an incriminating question, and then initiating a prosecution based on the answer. In such circumstances, the "false" denial would not mislead anyone or interfere with any legitimate law-enforcement objective. Under the government's interpretation of § 1001, the denial would nonetheless be a crime.

For thirty-five years, the exculpatory no exception has provided a necessary safe harbor from this sort of overreaching. The salutary effects of the rule should not be abandoned now.

ARGUMENT

Amicus curiae the NACDL advocates a clear and narrow limitation on the scope of false statements proscribed by § 1001: the NACDL's position is that § 1001 does not apply where a federal agent instigates questioning of a person who may know facts relevant to wrongdoing, where the agent poses a yes/no question to which the true answer would incriminate the person, and where the person gives the false exculpatory answer. The NACDL does not subscribe to the broader view that the statute precludes prosecution of those who (1) elaborate upon a simple exculpatory denial by affirmatively misdescribing facts, (2)

provide false denials to questions that would not implicate them in a crime, or (3) deny wrongdoing while volunteering information to obtain a government benefit. The exculpatory no doctrine's narrow limitation on the reach of § 1001 is supported by legislative intent as revealed in the drafting and revision of the language of the statute, by Congressional ratification of a longstanding judicial interpretation embracing this limitation, and by sound policy reasons.

I

THE FALSE-STATEMENT STATUTE WAS NEVER INTENDED TO PUNISH EXCULPATORY DENIALS

A simple exculpatory denial of the sort historically shielded by the exculpatory no exception has never been within the ambit of misconduct covered by the false-statement statute. As the evolution of the statute shows, Congress's concern has been limited to false statements that either (1) promote fraudulent claims, or (2) pervert agency functions. An exculpatory denial implicates neither of these concerns.

The Act of March 2, 1863 — "An Act to prevent and punish Frauds upon the Government of the United States" — was the progenitor to the present version of 18 U.S.C. § 1001. 12 Stat. 696. That Act focused on statements or conduct resulting in the approval of false claims against the federal government, and particularly false claims made by members of the armed forces. Specifically, it punished as criminal:

> any person . . . who shall make or cause to be made . . . any claim upon or against the Government of the United States, or any

> department or officer thereof, knowing such claim to be false, fictitious or fraudulent; [and] any person . . . who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false . . . statement . . . .

Id. at 696-697.

The statute was modified in minor respects in 1874, *see* Codification of December 1, 1873, approved June 22, 1874, R.S. § 5438, 18 Stat. 1054 (combining provisions and equalizing punishments applicable to soldiers and to civilians; omitting false oath and forgery clauses; and removing stealing and embezzlement clause to a separate provision); in 1908, *see* Act of May 30, 1908, ch. 235, § 5438, 35 Stat. 555-556 (changing range of applicable penalties); and again in 1909, *see* Act of March 4, 1909, ch. 321, § 35, 35 Stat. 1088, 1095 (punctuation and grammatical changes only). Throughout this period, false statements were only punished if connected to a claim made against the federal government.

In 1918, Congress expanded the breadth of the statute in two principal respects and increased the maximum penalties. *See* Act of October 23, 1918, ch. 194, § 35, 40 Stat. 1015-1016. First, the revised statute encompassed false claims made to "any corporation in which the United States of America is a stockholder." *Id.* Second, it reformulated the false statement clause to proscribe more generally false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States" in addition to those made for the purpose of obtaining the payment of a false claim. *Id.* The false statement clause then read:

> whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Id. at 1015-1016.

This Court construed the amended statute in *United States v. Cohn*, 270 U.S. 339 (1926), and limited the effect of Congress' choice of words. The Court sustained a demurrer to a criminal indictment charging that the defendant had made a false statement to obtain possession of imported items consigned to the United States Customs Department, when he was not entitled to those items until he paid the consignor for them. The Court held that the statute's proscription of false statements must relate solely to claims "for money or property to which a right is asserted against the government, based upon the Government's own liability to the claimant." *Id.* at 345-46. The Court further held that the "defrauding" clause must be limited to "cheating the Government out of property or money." The Court rejected the government's argument that it meant also "interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." *Id.* at 346.

Against this backdrop, Congress again amended the false statement statute in 1934. Prompted by a letter from

Harold L. Ickes, Secretary of the Interior, congressional committees looked into problems faced by agencies in the submission of false papers by regulated parties in connection with fledgling New Deal programs. *See* S. Rep. No. 73-288, at 1-2 (1934); H. Rep. No. 73-829, at 1-2 (1934). The Interior Department confronted difficulty in enforcing laws entrusted to it, S. Rep. No. 73-288 at 1, prominent among which was the Hot Oil Act, which prohibited the interstate transportation of oil in excess of amounts authorized by the federal government. *See United States v. Gilliland*, 312 U.S. 86 (1941). The petroleum industry routinely submitted false affidavits as part of "reports" required by agency regulations, and the government had no recourse against those who made such false statements. *Id.* at 90.

Congress responded to this problem by again broadening the false statement statute, this time adopting language broad enough to fend off the type of judicial limitation imposed by the Court in *Cohn*. As amended, the false statement clause, still embedded in the same section with the false claims prohibition, applied to:

> whoever shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.

Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996.

This Court in *Gilliland* confirmed that the 1934 revision accomplished what Congress set out to do: It curbed the efforts of regulated parties to thwart the regulatory functions of federal agencies by providing false

information about the substance of their activities. In *Gilliland*, the Court reversed a demurrer to an indictment charging that the defendant had submitted false forms to the Department of the Interior regarding oil shipments. Rejecting the defendant's argument that the revised statute covered only false statements related to matters in which the government had a financial interest, the Court held that the "amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Id.* at 93.

Until 1996 Congress made no further substantive revision of the false statement clause. In 1938, there were minor punctuation and organizational changes. *See* Act of April 4, 1938, Pub. L. No. 465, ch. 69, § 35, 52 Stat. 197. In 1948, Congress reorganized the criminal code, for the first time separating the false claims provision now contained in 18 U.S.C. § 287 from the false statement provision that is now § 1001. *See* Act of June 25, 1948, Pub. L. No. 772, ch. 645, §§ 287 & 1001, 62 Stat. 683, 698, 749. The only change made to the new § 1001 was that the phrase "within the jurisdiction of any department or agency of the United States" first appeared at the beginning of the provision rather than at the end.

After *Gilliland*, this Court construed § 1001 several times, in each instance confining its application to false statements that perverted an authorized function of the relevant government agency. In *United States v. Bramblett*, 348 U.S. 503 (1955), *overruled on other grounds*, *Hubbard v. United States*, 514 U.S. 695 (1995), it affirmed a jury verdict of guilty for a defendant who falsely represented to the Disbursing Office of the House of Representatives that a person was entitled to compensation as his official clerk. In *Bryson v. United States*, 396 U.S. 64 (1969), the Court

denied a petition for habeas corpus of a convicted person who had denied his affiliation with the Communist party in an affidavit submitted to the NLRB, so that his union could obtain hearing rights before the NLRB. In *United States v. Knox*, 396 U.S. 77 (1969), the Court reinstated an indictment based on the defendant's understatement of the number of people he employed in his wagering business on a form submitted to the Internal Revenue Service. In *United States v. Yermian*, 468 U.S. 63 (1984), the Court upheld a conviction based on falsities in a Department of Defense security questionnaire, submitted by the defendant's employer to obtain defense contracts. And, in *United States v. Rodgers*, 466 U.S. 475 (1984), the Court reinstated an indictment based on a false story told to the FBI by a defendant who instigated the encounter to prompt the FBI to use its resources to find his estranged wife for him. In each of these cases, the charges alleged that a person, with a false story, either attempted to extract a benefit or services from a government agency, or perverted the objective of a government agency from performing its regulatory, collection, or oversight functions.

Congress' revisions of the false statement statute do not indicate any intent to extend the conduct made criminal by § 1001 beyond statements that promote false claims or pervert agency functioning. Straightforward exculpatory denials of guilt in the narrow circumstances discussed do not pervert agency functioning in the sense that Congress sought to address when it broadened the reach of the statute in 1934. Government agents know that when they surprise a person with accusations of wrongdoing, the person's natural inclination, like that of the proverbial child caught with his hand in the cookie jar, is to deny involvement. In the real world of criminal investigations, such denials are necessarily taken with a grain of salt. *See, e.g., United States v. Medina De Perez*, 799 F.2d 540, 546 (9th Cir. 1986);

United States v. Phillipe, 173 F. Supp. 582, 584 (S.D.N.Y. 1959). Although a truthful confession by that person could materially aid the investigation, a false denial under these circumstances has no more potential to hamper the investigation than if the interviewee refused to answer the agent's question at all, which he unquestionably has a right to do.

Because simple exculpatory denials do not pervert agency functioning as do the false statements Congress sought to address in enacting and revising § 1001, this conduct ought not trigger criminal liability under the statute.

II

CONGRESS RATIFIED THE LONGSTANDING "EXCULPATORY NO" LIMITATION WHEN IT REENACTED § 1001 WITHOUT RELEVANT CHANGE

The original intent of Congress not to include exculpatory denials within the broad language of § 1001 is confirmed by the endorsement of this limitation by a subsequent Congress. Beginning in 1962, federal courts of appeals confronted the government's position that § 1001 applied to any instance where the defendant falsely denied criminal activity. For the next thirty-two years, every court of appeals presented with these facts recognized that § 1001 did not sweep exculpatory denials within its mantle. With knowledge of this widespread judicial interpretation of the statute, Congress reenacted the pertinent language in 1996, acquiescing in the limitation contained in the 1934 statute as explained by the courts.

A. The Courts of Appeals Have Interpreted § 1001 to Exclude Exculpatory Denials as a Basis for Criminal Liability.

In 1955, a federal district court held that the government could not use § 1001 to prosecute defendants who had answered "no" in response to questions by FBI agents on the matter whether the defendants knew of payments made to FHA officials. *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955). In 1962, the Fifth Circuit became the first federal court of appeals to recognize this limit on § 1001, excluding exculpatory false negative responses made to federal agents who instigate questioning. *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962).

Over the next thirty years, seven other circuits followed suit, some applying the limitation even more expansively than the Fifth Circuit originally articulated it. *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972), *cert. denied*, 425 U.S. 935 (1976); *United States v. Chevoor*, 526 F.2d 178 (1st Cir. 1975); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980); *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986); *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988); *United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990); *Moser v. United States*, 18 F.3d 469 (7th Cir. 1994).

During that period, four other circuits discussed the exculpatory no doctrine as it existed in other circuits, disagreed with the broad application that the doctrine had received in some courts, and reserved the question whether it would apply to a situation where an interviewee was approached for questioning in connection with a criminal investigation and merely denied complicity in response to a question that would inculpate him. *United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986); *United States v. White*, 887

F.2d 267 (D.C. Cir. 1989); *United States v. Steele*, 933 F.2d 1313 (6th Cir.), *cert. denied*, 502 U.S. 909 (1991) (*en banc*); *United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, 506 U.S. 1033 (1992).

Thus, in the sixty years after the language of § 1001 was adopted in 1934, all twelve federal circuits with jurisdiction over criminal cases had either embraced an exculpatory no limitation on § 1001 or commented on it without rejecting it. No court of appeals disagreed until the Fifth Circuit in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (*en banc*), reversed course, and the Second Circuit in this case, *United States v. Wiener*, 96 F.3d 35 (2d Cir. 1996), *cert. granted sub nom Brogan v. United States*, 117 S. Ct. 2430 (1997), followed suit.

B. Congress Was Expressly Aware of the Judicial Interpretation.

This Court will impute knowledge to Congress of the law as interpreted by the courts even in the absence of express indications of knowledge. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). But here, there is direct evidence that in maintaining the relevant language of § 1001 intact, Congress knew perfectly well of the courts' widespread acceptance of the exculpatory no limitation.

In 1981, the Senate evaluated a major overhaul of the criminal code. As part of an extensive report, the Committee on the Judiciary addressed several examples of restrictive applications placed on § 1001 by the courts. S. Rep. No. 97-307, at 402-415 (1981). The Committee discussed the narrow construction of the term "jurisdiction,"

id. at 403, the extension of the materiality element to every clause in the statute, *id.* at 404, and the exculpatory no doctrine as articulated in *Paternostro*. *Id.* In its proposal to the Senate, the Committee indicated its agreement that a narrow version of the exculpatory no doctrine accurately reflected the intent of the statute's framers, and suggested new language that would make the doctrine express:

> With respect to the so-called "exculpatory no" cases, the Committee has determined *to perpetuate* a limited version of this doctrine through the defense afforded in subsection (b). Under this provision it is a defense to a prosecution for an oral false statement to a law enforcement officer . . . that the statement was made "during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense."

Id. at 407 (emphasis added; footnote omitted). Because the thorough code revision died in that session of Congress, Congress did not act on this proposal either way, and the statute remained unchanged at the expiration of the session.

C. Congress Ratified the Exculpatory No Limit on § 1001.

Congress revisited the scope of § 1001 after this Court decided *Hubbard v. United States*, 514 U.S. 695 (1995). That case reversed the Court's opinion in *Bramblett*, *supra*, which had held that § 1001 proscribed false statements made to the legislature and to the judiciary, as

well as those made to executive branch agencies. Concerned that Congress was no longer protected from persons who lied before it, congressional committees conducted hearings on the issue. *U.S. v. Hubbard: Prosecuting False Statements to Congress*: Hearing Before the Subcomm. on Crime on the House Comm. on the Judiciary, 104th Cong., Serial No. 41 (1995). As a result of those hearings, the House committee recommended Congress reenact § 1001, with changes designed to reverse, in part, the effects of the *Hubbard* decision. The portion of the proposal defining the criminal conduct remained the same as in the 1948 statute, [2] but the language "department or agency" — limited by *Hubbard* to the executive branch — was replaced with "the executive, legislative or judicial branch."

The Committee was careful to point out that it recommended these changes "while ensuring that the scope of section 1001 is limited, as it was prior to *Hubbard*." H.R. Rep. 104-680, at 2 (1996). Congress passed the amendment. The False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1996).

This Court has repeatedly held that when Congress reenacts a statute without change, with knowledge of a judicial or agency interpretation based on the language in the previous version, Congress ratifies that interpretation. *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n. 7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments ever been proposed, and we therefore may assume that our interpretation was correct."); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("[W]e have

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[2] The amendment did separate with subheadings the three different clauses of the statute, and made clear that the materiality requirement applied to each clause.

recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'") (citation omitted); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-382 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) ("In light of this well established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action."); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that the interpretation is the one intended by Congress.").

In one of the more celebrated cases of congressional acquiescence in a consistent judicial interpretation, the courts had crafted a statutory exemption that was in no way discernible from the language of the statute itself. *Flood v. Kuhn*, 407 U.S. 258 (1972). This Court had held in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), that the baseball industry was exempt from the proscriptions of the Sherman Act. In 1953, it reaffirmed that understanding of the Sherman Act, based on "Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction." *Flood*, 407 U.S. at 273-74 (describing holding of *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953)). In 1971, the Court again evaluated Congress' failure to change the operative language of the Sherman Act, and held that such failure revealed that Congress had "no intention to subject baseball's reserve

system to the reach of the antitrust statutes." *Id.* at 283. Recognizing that there may be some "inconsistency and illogic" in the application of the baseball exception to the Sherman Act, the Court stated that "there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency." *Id.* at 284. It noted that any change in the longstanding interpretation of the statute must properly come from Congress, and not the courts. *Id.*

The doctrine of ratification is not limited to congressional silence in the face of Supreme Court authority. In *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974), this Court divined congressional intent based on congressional silence in the face of a statutory interpretation of "almost perfect consistency [in] the Courts of Appeals." The Court held that "in the face of this longstanding interpretation and the continued congressional silence," it would not deviate from this interpretation in its reading of the scope of the statute. *Id.* at 200-201. Likewise, in *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780 (1985), the Court held that Congress ratified "[t]he *Scroggins* standard" as articulated in a series of lower court cases when it amended 5 U.S.C. § 8347.

This Court recently rejected an argument of legislative ratification in the context of a legislative history that differs in pertinent respects from the history of § 1001. In *United States v. Wells*, 117 S. Ct. 921, 931-32 (1997), the Court held that Congress had not ratified a judicial interpretation of 18 U.S.C. § 1014 holding materiality to be an element of the offense. Recognizing that "the significance of subsequent action or inaction necessarily varies with the circumstances," *id.* at 929, it held that Congress' reenactment did not ratify the judicial interpretation because the Supreme Court had "previously

described the elements of § 1014 without any mention of materiality" and "[i]t would thus be impossible to say" whether Congress adopted the view of the courts of appeals, or of the Supreme Court. *Id.* at 930. Here, of course, there was no conflict between the exculpatory no doctrine and the Supreme Court opinions construing § 1001. Moreover, when Congress reenacted § 1001, it was focused specifically on judicial limitations placed on the core criminal conduct proscribed by the statute. When Congress reenacted § 1014, as discussed in *Wells*, it addressed only penalty and definitional changes, and had no reason to consider and thus ratify judicial limitations placed on the elements of the statute.

Here, Congress was faced with over thirty years of near-unanimous authority limiting the scope of criminal liability under § 1001. Congress mobilized to change a different restriction this Court had placed on the text of the statute. But when Congress reenacted the statute to redress that particular limitation, it left intact the core provision defining criminal conduct on which courts had based the exculpatory no doctrine. This reenactment represents more than mere silence; it demonstrates Congress' acquiescence in the application of the exculpatory no limitation to the statute. Like the Court in *Flood*, this Court should maintain consistency and refrain from intruding on Congress' power to remove the exculpatory no limitation from the statute if it so desires.

III

SOUND POLICY REASONS SUPPORT THE EXISTENCE OF AN "EXCULPATORY NO" LIMITATION ON § 1001

A. An Exculpatory No Limitation Promotes The Sharing of Information With Government Officials.

False exculpatory denials are obviously not something that should be encouraged for their own sake. But if the larger goal of the statute is to promote accurate information sharing with the government, the exculpatory no rule serves this goal far better than the alternative. By providing a safe harbor for simple exculpatory denials, the exculpatory no rule avoids a powerful disincentive for witnesses to speak with investigators, and to provide truthful information short of that which may incriminate. Elimination of the rule might result in fewer false exculpatory denials — which, for reasons noted above, do not by their nature have a substantial capacity to mislead in any event. But that would come at the expense of a great deal of truthful and useful information that witnesses now have incentives to share with the government under the present rule.

A person whose name surfaces in the course of a criminal investigation, due to suspected involvement or proximity to a suspicious event, may wish to grant an interview to federal agents for any number of reasons. He may be unaware of any criminal wrongdoing and feel a sense of obligation to assist authorities; or he may be aware of wrongdoing and wish to cooperate to some extent with the hope of later receiving lenient treatment. Regardless of his motive, such a person often has knowledge of people and events that may assist the agent in contacting new leads for information and in reconstructing the events surrounding the

conduct in question. An investigating agent will benefit from whatever information he can collect.

If the person allows an agent to question him, he opens himself to the risk that the agent will confront him with inculpatory questions he would prefer not to answer. Although he is free not to answer, he may not understand this right, or if he does, he may nonetheless feel pressured to answer, or become concerned that silence will raise suspicions. But even if the person falsely denies wrongdoing, it is still in the best interest of the government for the interview to have occurred because it will have elicited other truthful information which will help to build the government's case. In a world where prosecutions under § 1001 cannot be brought against persons who merely deny guilt in the investigative setting, persons will not be deterred from granting such an interview, because they will face no risk of prospective criminal liability in doing so as long as any discursive information they supply is truthful.

On the other hand, in a world where the exculpatory no limitation did not apply, many people would be unwilling to speak with federal agents at all out of fear that their cooperation could be turned against them in a § 1001 proceeding. Understanding that an exculpatory no raised the possibility of a § 1001 prosecution, such a person would likely decline to grant an interview, to avoid the suspicion cast when he refuses to answer one question in an array. The diminished willingness of citizens to speak with government agents is far more likely to pervert the functioning of the investigating agency than is a narrow limitation on § 1001 that merely exempts false exculpatory denials of the sort that are unlikely to mislead in any event.

B. An Exculpatory No Exception Helps Curb Law Enforcement Overreaching.

Elimination of the exculpatory no rule would not only have perverse effects on the success of criminal investigations, but would also open the door to sharp law-enforcement practices. Courts have long been concerned that the prosecution of exculpatory denials may lead to abuse. In *United States v. Levin*, 133 F.Supp. 88, 90 (D. Col. 1953), the court reasoned that under a literal interpretation of § 1001:

> [a]ny person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime. . . . In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute.

The court's concern with the anomalous situation of acquittal for the crime that the defendant has "falsely" denied and conviction for this "false" denial is not mere hyperbole. Not uncommonly, the criminal charge based on the conduct the defendant denied will drop out, leaving only a § 1001 charge. *See, e.g., United States v. Rodriguez-Rios*, 14 F.3d.

1040, 1042 (5th Cir. 1994) ("After a bench trial, the court dismissed the first count for insufficient evidence but found Rodriguez guilty on the second [count under §1001]."). Under the government's reading, Section 1001 would become a weapon to shore up an insufficient case or correct an earlier mistake.

United States v. Bush, 503 F.2d 813 (5th Cir. 1974), is illustrative of the ease with which § 1001 could be used for such purposes. In that case, IRS agents, claiming they wished to verify the tax forms of a third party, interviewed and then procured an affidavit from the defendant regarding a transaction between himself and the man under investigation. More than one year later — after the statute of limitations had expired for a § 1001 prosecution on the first affidavit — the agents returned to the defendant for his signature on another affidavit. Their obvious purpose was to *elicit* a § 1001 violation. The NACDL fears that all too often, that would be the practical day-to-day effect of a rule that criminalized exculpatory denials.

A similar situation arose in *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986). An IRS special agent investigating tax violations of another person came across information implicating Ms. Tabor in an illegal notary transaction under state law. After he familiarized himself with the details of Florida notary law, the IRS agent elicited false statements from Ms. Tabor regarding her notarization of a mortgage satisfaction. Although it was not misled in any way, the government no doubt *suspected* that the woman would falsely deny wrongdoing; and when it invited her to do so, she (regrettably) complied. This is not the sort of interaction between the United States and its citizens that should be encouraged. *See United States v. Cowden*, 677 F.2d 417, 420 (8th Cir. 1982) ("The Customs inspection should be conducted so that the probable result is compliance

with the law, not the eliciting of a violation of the law."). But it is precisely the sort of interaction that may become prevalent if the government's reading of § 1001 prevails.

These examples illustrate the potential abuses sanctioned by an interpretation of § 1001 that essentially allows agents to generate felony charges, based on falsehoods that pose no danger that the agents will be misled or that agency functions will be perverted. *See United States v. Stoffey*, 279 F.2d 924, 927 (7th Cir. 1960); *United States v. Dempsey*, 740 F. Supp. 1299, 1306 (N.D. Ill. 1990). For over three decades, the exculpatory no doctrine has provided an important check on the most obvious potential abuses. The rule has served as an important, salutary purpose, with the express sanction of Congress, and should not be jettisoned now.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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